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**IMPLICATIONS OF THE SUPREME
COURT'S BOUMEDIENE DECISION FOR
DETAINEES AT GUANTANAMO BAY, CUBA:
ADMINISTRATION PERSPECTIVES**

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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**IMPLICATIONS OF THE SUPREME COURT'S BOUMEDI-
ENE DECISION FOR DETAINEES AT GUANTANAMO
BAY, CUBA: ADMINISTRATION PERSPECTIVES**

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, July 31, 2008.

The committee met, pursuant to call, at 2:04 p.m., in room 2118, Rayburn House Office Building, Hon. Ike Skelton (chairman of the committee) presiding.

**OPENING STATEMENT OF HON. IKE SKELTON, A REPRESENTA-
TIVE FROM MISSOURI, CHAIRMAN, COMMITTEE ON ARMED
SERVICES**

The CHAIRMAN. Good afternoon. Our committee will come to order.

This afternoon, we have the second part of our series of hearings on the implication of the *Boumediene* decision from the United States Supreme Court.

For this afternoon's panel, we have Mr. Daniel Dell'Orto, who is the Acting General Counsel for the Department of Defense; Gregory Katsas, who is the Assistant Attorney General for the Civil Division of the Justice Department; Colonel Steve David, the Chief Defense Counsel in the Office of Military Commissions in the Department of Defense; and Sandra Hodgkinson, who is the Deputy Assistant Secretary for Detainee Affairs in the Department of Defense, who will not testify but will be available for questions. Am I correct?

Ms. HODGKINSON. Yes, sir.

The CHAIRMAN. Ranking Member Duncan Hunter, remarks.

**STATEMENT OF HON. DUNCAN HUNTER, A REPRESENTATIVE
FROM CALIFORNIA, RANKING MEMBER, COMMITTEE ON
ARMED SERVICES**

Mr. HUNTER. Mr. Chairman, let's get right with the program here; and I look forward to the witnesses' statements. I am sure we will have some good questions afterwards.

The CHAIRMAN. Thank you.

STATEMENTS OF DANIEL J. DELL'ORTO, ACTING GENERAL COUNSEL, DEPARTMENT OF DEFENSE; GREGORY G. KATSAS, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; COL. STEVEN DAVID, USA, CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS, DEPARTMENT OF DEFENSE; AND SANDRA HODGKINSON, DEPUTY ASSISTANT SECRETARY FOR DETAINEE AFFAIRS, DEPARTMENT OF DEFENSE

The CHAIRMAN. Mr. Dell'Orto, you are on.

STATEMENT OF DANIEL J. DELL'ORTO

Mr. DELL'ORTO. Thank you, Mr. Chairman, Ranking Member Hunter, and members of the committee for the opportunity to testify on the implications of the Supreme Court's *Boumediene* decision for detainees at Guantanamo Bay, Cuba.

The Department of Defense is working diligently to satisfy the considerable litigation requirements stemming from the Supreme Court's decision in *Boumediene v. Bush*. The ramifications of that decision for the Department of Defense and for our Nation are significant. The Department already has experienced some of these ramifications, while others are looming in the near future and still others are as yet unknown. As significant as *Boumediene* is, it is only one in a recent line of decisions that establish an unprecedented level of judicial involvement in matters historically and, in the Department's view, most appropriately reserved to military professionals, including decisions on whom to detain as enemy combatants in an ongoing armed conflict.

There are currently more than 250 petitions for the writ of habeas corpus pending in federal district court that involve more than 300 current or former Guantanamo detainees. Now that the Supreme Court has ruled that these petitions may proceed, the Department is diverting personnel and assets from other ongoing missions to respond to them. Those diverted are not just legal personnel and administrative assets. We also have diverted or are in the process of diverting substantial numbers of intelligence assets to support this litigation.

The Department's immediate challenge is that what the law requires is currently unclear. As the Attorney General noted in a July 21st, 2008, speech, the Supreme Court explicitly left many questions unanswered in *Boumediene*. The Court said that Guantanamo detainees have a constitutional right to pursue habeas proceedings in federal court. The Court did not say how these cases would proceed or what procedures and standards would apply. Given this lack of direction, and in the absence of legislation, the rules governing habeas proceedings for detainees at Guantanamo will be devised on an ad hoc basis in federal district courts.

Although we do not know what the federal district courts will decree as the ultimate requirements for these proceedings, we anticipate a number of potential problems.

First, these habeas proceedings could require the diversion of significant operational, law enforcement, and security resources, in addition to administrative, legal, and intelligence resources. In addition to the significant resources the Department already is devoting to this litigation, if judges order the in-person appearance of de-

tainees at hearings, numerous security assets would need to be devoted to the task.

As alarming, if federal district court judges issue subpoenas requiring in-person testimony of those who gathered the relevant information pertaining to a habeas petitioner, combat troops, intelligence personnel, and other critical military and civilian personnel may need to be pulled from the theater of combat operations and sent to Washington, DC, to answer questions from detainees' lawyers.

As Justice Jackson presciently noted in *Johnson v. Eisentrager* in 1950, and I quote, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."

Indeed, the Supreme Court, in *Boumediene*, acknowledged that the conduct of habeas proceedings for Guantanamo detainees could raise national security issues.

Second, the rules for habeas proceedings could affect how our soldiers, sailors, airmen, and marines fight on battlefields around the world. It must be emphasized that petitioners in these cases have been detained under the law of war during an ongoing armed conflict. These are not the typical habeas proceedings in a civilian context with which the federal judiciary is familiar. Judges could require arrest reports, chain of custody authentication reports, or other evidentiary processes. Rulings that evidence must be excluded or that a detainee must be freed because certain evidentiary processes, relevant to a civilian but not a wartime environment, were not followed, would, in effect, serve to regulate our troops on the battlefield, just as judges, in effect, regulate the local police in civilian life.

Third, habeas proceedings could be used as a vehicle for detainees charged with war crimes to attempt to halt or delay their military commission trials. The Supreme Court ruling in *Boumediene* was focused on challenges to the lawfulness of detention, not on military commission procedures as provided in the Military Commissions Act.

Further, the Court looked favorably on the adversarial proceedings of prior military commissions. Although a federal district court judge recently rejected the effort of one detainee to block his military commission trial, another detainee already has filed a court challenge to stop his military commission from moving forward, and others almost certainly will follow. As the Attorney General explained, Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants.

Finally, the Supreme Court, while providing access for detainees to the federal district courts for habeas proceedings, let stand the alternative route to the Court of Appeals for the District of Columbia Circuit Court under the Detainee Treatment Act. Detainees now have two separate and redundant legal channels through which they can challenge the legality of their detention, one under the Detainee Treatment Act and the other under the Constitution. This dual-track challenge to detention only serves to strain the re-

sources of the Department further, providing detainees greater opportunities to challenge their detention than those that are available to U.S. citizens imprisoned in the United States.

These are but a few of the concerns we have about Guantanamo detainee habeas proceedings and their consequences for the Department. We recognize that there are opposing considerations and that writing the rules governing these habeas proceedings will require a difficult balancing of interests. The Department acknowledges and respects the judgment and expertise of the federal courts. Nevertheless, Congress is best suited to conduct this balancing and to write the rules for habeas proceedings for detainees at Guantanamo Bay.

The federal district courts do not have the institutional competency that Congress has to address these questions effectively and efficiently, appropriately taking into account national security concerns and the potential impact on ongoing military operations. Further, judges might impose conflicting rules, putting the Department in an untenable position at least until those differences can be resolved in higher courts after considerable delay and uncertainty while the war on terror continues. Although the D.C. District Court is attempting to coordinate the cases to some degree, many substantive issues likely will be determined by multiple judges in individual cases.

Finally, unlike Congress, federal judges cannot consider and refine the entire statutory framework of Guantanamo detainee legal process. By providing rules for habeas proceedings, Congress can ensure that habeas proceedings do not delay trials by military commission and justice for the victims of the September 11th, 2001, attacks. Congress can ensure that the government does not waste resources litigating and relitigating the very same issues in the more than 250 pending habeas petitions and in the more than 190 cases in the United States Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act. Legislation, not litigation, is the best vehicle for writing these rules.

The Department of Defense fully supports the six specific principles that the Attorney General suggested should guide the legislation of rules for habeas proceedings for detainees at Guantanamo Bay, Cuba, as he articulated in his recent speech.

First, Congress should make clear that federal courts may not order the government to bring, admit, or release those detained at Guantanamo Bay into the United States.

Second, Congress should ensure our national security secrets are protected and that terrorists do not use these proceedings as a means to discover what we know about them and how we acquired that information.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes.

Fourth, Congress should explicitly reaffirm that the United States remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations and that the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures adapted to the realities of national security. To eliminate duplicative efforts and inconsistent rulings, one district court should have exclusive jurisdiction over these habeas cases, and common legal issues should be decided by one judge in a coordinated fashion. Military service members should not be required by subpoenas to leave the front lines to testify as witnesses in habeas hearings. Affidavits prepared after battlefield activities have ceased should suffice. Military members should not be required to create such documents as the arrest reports and chain of custody logs that civilian law enforcement entities use.

Sixth, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. Congress should eliminate statutory judicial review under the Detainee Treatment Act. Congress should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of U.S. custody.

Along these lines, the Department of Defense requests that legislation expressly confirm that the habeas jurisdiction of the federal courts does not extend beyond the holding of *Boumediene*. We believe this proposition is reflected in the current law following *Boumediene*, which extended constitutional habeas jurisdiction based on the unique circumstances prevailing at Guantanamo Bay.

It goes without saying, however, that all of the difficulties that we face with respect to the Guantanamo habeas petitions would pale in comparison to the difficulties we would encounter were federal court jurisdiction extended to those detained in or near a zone of active hostilities, such as in Iraq and Afghanistan. The burden of litigating the petitions of some 270 detainees at Guantanamo is considerable, but the prospect of litigating the petitions of multiple hundreds of alien detainees in Afghanistan and tens of thousands of alien detainees in Iraq would simply be crippling. The Constitution of the United States hardly contemplates such a result.

In conclusion, although the topic of today's hearing is the implications of the Supreme Court's *Boumediene* decision for detainees at Guantanamo Bay, Cuba, I have begun by discussing the implications of *Boumediene* for the Department of Defense. In my current position as Acting General Counsel of the Department of Defense, as in my previous career as a judge advocate and Army line officer for more than 27 years, my foremost duty has always been to our troops, to ensure that they can lawfully do what is necessary to fight and win our Nation's wars and to defend our Nation from attacks, whether those attacks come from adversary nations or from nonstate actors such as al Qaeda.

We must remain mindful that the enemy we face today and have faced since the early 1990's uses 21st century technology to perpetrate brutal, indiscriminate attacks on civilians. As the Congress considers legislation in response to *Boumediene* and weighs the many important interests at stake, I respectfully trust that you will carefully consider this as well.

Thank you very much.

[The prepared statement of Mr. Dell'Orto can be found in the Appendix on page 35.]

The CHAIRMAN. Mr. Katsas, Assistant Attorney General.

STATEMENT OF GREGORY G. KATSAS

Mr. KATSAS. Thank you, Mr. Chairman.

The CHAIRMAN. Get as close to that as you can, would you, please?

Mr. KATSAS. Can you hear me?

Mr. Chairman, Congressman Hunter, members of the committee, you have my full written statement, so let me just give you a brief summary here.

I appear before you today as the Assistant Attorney General for the Civil Division, which is responsible for handling the hundreds of habeas corpus and Detainee Treatment Act cases brought by aliens detained as enemy combatants at Guantanamo Bay, Cuba. In the wake of the Supreme Court's *Boumediene* decision, the parties to those cases and the lower courts face unprecedented challenges.

Boumediene makes clear that its extension of habeas corpus to review wartime status determinations of aliens captured and held outside the United States is unprecedented. In this context, there are no controlling federal rules or statutes. There are few relevant federal precedents. There is no past experience. And while *Boumediene* itself recognized that habeas proceedings in this context must take account of practical considerations and wartime exigencies, the Court gave little guidance about how to proceed with the enormously difficult and sensitive task of ensuring fairness to detainees, while at the same time not unduly impeding the prosecution of an ongoing armed conflict.

Recently, the Attorney General invited Congress to establish some guidelines for the efficient, fair, and safe adjudication of these difficult habeas cases. Let me briefly give you a litigator's perspective on the urgency of his six specific proposals.

First, judges should be prohibited from ordering the release of detainees into the United States. In one case, we already have a pending motion for release not only into the United States but into greater Washington, DC, and even before habeas proceedings have run their course. Congress should act quickly to prevent judges from releasing potentially dangerous individuals into our midst.

Second, habeas procedures should ensure adequate protection for classified information. The military must never be put to an impossible choice, as our opponents have urged, between revealing classified information to al Qaeda or releasing dangerous al Qaeda operatives.

Third, habeas proceedings should not interfere with war crimes prosecutions before military commissions. In *Boumediene*, the Supreme Court cited adversarial military commission procedures with approval. Yet in the habeas litigation, Ramzi Bin Al Shib, who prosecutors believe was a principal facilitator of the September 11 attacks, has moved to stop his war crimes trial through habeas. Congress should act to ensure that the trials move forward, so that terrorists can be brought to justice.

Fourth, Congress should reaffirm the President's detention authority in the ongoing armed conflict with al Qaeda. We think that authority is obvious, but in the recent Al-Marri case, four of nine

judges on the Fourth Circuit would have held that the military lacks any authority to detain any member of al Qaeda—not Khalid Sheikh Mohammed; not Mohammed Atta, if we had managed to catch him in time; not even Osama bin Laden. Congress should definitively correct that dangerous misunderstanding of military authority.

Fifth, Congress should establish sensible procedures to govern the adjudication of the pending habeas cases. The question of what procedures are appropriate remains entirely unsettled. The judges have asked for briefing on basic procedural framework issues, such as burdens of proof, extent of discovery, and the need for evidentiary hearings. In no other context that I know of are fundamental rules like that so basically unsettled. To facilitate the prompt and uniform handling of these cases, Congress should adopt a streamlined but fair framework along the lines that the Supreme Court approved for habeas proceedings involving citizens held as enemy combatants.

Sixth, and finally, Congress should eliminate the now unnecessary judicial review proceedings in the Detainee Treatment Act, which were intended as a substitute, not as an addition to habeas. Now that habeas review is once again available, there is no sense in requiring the government, the detainees, or the courts to engage in the duplicative adjudication of about 190 Detainee Treatment Act petitions on top of about 250 pending habeas petitions.

Thank you very much.

[The prepared statement of Mr. Katsas can be found in the Appendix on page 44.]

The CHAIRMAN. Colonel David.

STATEMENT OF COL. STEVEN DAVID

Colonel DAVID. Thank you, Chairman Skelton, members of the House Armed Services Committee.

The CHAIRMAN. Please get a little closer.

Colonel DAVID. Is this a little better?

The CHAIRMAN. Turn it on.

Colonel DAVID. Thank you again, Chairman Skelton—

The CHAIRMAN. There you go.

Colonel DAVID [continuing]. Members of the House Armed Services Committee.

My name is Colonel Steve David, and I am grateful for the invitation and honor to testify before this committee. I have prepared and submitted my testimony, so what I intend to do is summarize that testimony and then give you all more time to ask questions.

My testimony is given in my capacity as a private citizen who is currently serving as the Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of the Department of Defense, the Army, my subordinates, or any other entity.

I have been asked to testify today about the implications of the Supreme Court's decision in the *Boumediene* case and how they are likely to affect the detainees at Guantanamo Bay.

I have served as the Chief Defense Counsel in the Office of Military Commissions since August of 2007. I have, in that time, seen the number of cases expand from 2 to 21. I have served the United

States Army for over 26 years in a myriad of assignments, both on active duty and as a member of the Reserve Component Services.

While I am currently serving as Chief Defense Counsel, I am on leave from my civilian profession as an elected trial court judge in the state of Indiana. I have served over 13 years as a trial judge in Indiana. I consider myself a public servant. I have also served as a military judge, both in the Army Reserves and on active duty in the United States Army.

I am proud to be an elected officeholder, and I am proud to wear the uniform of the United States military. In my office in Boone County, Indiana, I proudly display with great reverence the flag of honor with the names of the 9/11 victims.

I do not see my role as Chief Defense Counsel or my obligations as an officer of the United States military or as a judge any way inconsistent with these obligations. I think they are entirely consistent.

Because of the unique vantage point I have, I will generally confine what I have to say to what *Boumediene* means for the military commissions.

To put it briefly, the most important thing that *Boumediene* held is something that I always thought was obvious. Like Thomas Paine in *Common Sense*, in America, the law is king. For, as in absolute governments, the king is the law, so in free countries, the law ought to be the king, and there ought to be no other.

Boumediene held that in America, there are no law-free zones. This is an issue only because of the choice in 2002 to move enemy combatants from Afghanistan and terrorism suspects captured around the world to the U.S. military base at Guantanamo Bay. Even though the government treats the base as if it were U.S. soil for every other purpose, it has taken the position that it is foreign soil when it comes to the constitutional rights of the people we hold there. *Boumediene* puts that convenient theory to rest.

In particular, *Boumediene* makes it clear that federal courts will ultimately have habeas review over the military commissions process, and the commission defendants have constitutional rights. The gist of the Court's holding is that, unless enforcing a right would be impractical, it should be honored. If the suspension clause applies in Guantanamo, then so must the ex post facto clause and other fundamental due process rights, like the prohibition on the use of coerced statements and the right to confront one's accusers.

There is nothing impractical about ensuring that the commissions live up to basic American standards of justice. The constitutional protections promised by *Boumediene* are particularly important at a time when the highly politicized atmosphere surrounding the commission trials has begun to compromise their fairness.

The legal adviser to the convening authority has been disqualified from one case already for overstepping the role to such an extent that it amounted to unlawful command influence. Much of this appeared motivated by a desire to accelerate as many of the cases as possible before the Presidential election. If this process cannot survive a Presidential election, I submit to you it cannot survive, and does not deserve to survive, which brings me to the question of whether, after *Boumediene*, these commissions should survive.

To reiterate my opening point, *Boumediene* reaffirmed what should be a surprise to no American, that where our government is sovereign, the Constitution is sovereign. This fact will lead to the ultimate striking down of the most constitutionally suspect of the military commission's procedures now in place. The only question that remains is how long it will take, how many convictions must be reversed, and whether it will be the product of the rulings of the military judges presiding over the commissions or the federal courts on appellate or habeas review.

Since it is now simply a question of when, the only remaining one is why we started down this road in the first place. The ultimate tragedy is the United States federal courts and military courts martial are more than capable of trying terrorists under traditional principles of American justice. As one of my favorite country music singers, Toby Keith, explains in one of his songs, "There ain't no right way to do the wrong thing." It would have been better had we done the right thing from the beginning, but it is not too late to change direction and do it now. I advocate that we utilize the federal criminal court system, with the safeguards in place, or the military justice system under the Uniform Code of Military Justice.

Thank you for the opportunity to address your group. Again, I have submitted my testimony in written format and would be happy to answer any questions.

The CHAIRMAN. Thank you very much.

[The prepared statement of Colonel David can be found in the Appendix on page 58.]

The CHAIRMAN. We have a series of six votes—one 15-minute vote, and the others are 5 minutes. So it will probably be about a 40-minute break. And I hope that doesn't disturb your afternoon too much. But I think we might be wise just to go ahead—this is a good place to break—and come back as soon as we can. We will resume the questioning.

We thank you again for being with us. We look forward to the questions shortly. We will take a recess.

[Recess.]

The CHAIRMAN. Our hearing will come to order.

We apologize to the witnesses, and we thank you for your patience. We had a series of votes, plus one unexpected one that took a considerable amount of time. So we will proceed, and the gentleman from New York is with us. We will be able to forge right ahead.

Let me ask, Mr. Dell'Orto, yesterday, Colonel Davis testified, and in his testimony he testified to the undue political influence that permeates the military commission process. Much of Colonel Davis' complaint deals with the overly intrusive supervision of the prosecution by the current legal adviser to the convening authority, an issue which Judge Allred in the *Hamdan* military commission case recently addressed.

In the May 9, 2008, order Judge Allred, a captain in the United States Navy, found that the actions of the current legal adviser, General Thomas Hartman, reflected too close an involvement in the prosecution of commission cases and suggested an improper influence on the chief prosecutor's discretion. As a result, Judge

Allred ordered the disqualification of the legal adviser from further participation in the *Hamdan* case. I understand that the legal adviser has been removed from the *Hamdan* case. My first question is: Is that true?

Mr. DELL'ORTO. Mr. Chairman, consistent with the judge's order in that case, there is a legal adviser who has been appointed to continue the——

The CHAIRMAN. He has been removed?

Mr. DELL'ORTO. There is a different one who has been appointed; yes, sir.

The CHAIRMAN. Fine. Thank you. And someone has been named in his place?

Mr. DELL'ORTO. Yes, sir, for that particular case.

The CHAIRMAN. Okay. What is being done to eliminate undue command influence in all these military commission cases, Mr. Dell'Orto?

Mr. DELL'ORTO. Mr. Chairman, I take issue with Colonel Davis' remarks in that regard; and I would cite to the committee the report that has been posted on our Web site, the one that was done at the then General Counsel Jim Haynes' direction by Brigadier General Tate from the United States Army; Brigadier General Hardy from the United States Air Force; then Captain, now retired, Admiral Tronberger, who looked into the allegations of Colonel Davis and came up with findings and recommendations that addressed those issues. And my reading of that report does not concur with, I think, Colonel Davis's assessment of the situation that prompted him to resign from his position.

The CHAIRMAN. Mr. Katsas, yesterday, Steve Oleskey suggested in his testimony—I am sure I am quoting it right—that we should let this issue regarding the commissions play out in the courts before we attempt to legislate on the issue. Mr. Katyal didn't quite go that far, but he thought it ought to play out for a short while, if I remember his testimony correctly.

Do you have an opinion on that? Should we forge ahead, or should we wait until the courts have the opportunity to work more cases? Or where do you recommend we go?

Mr. KATSAS. I am sorry, Mr. Chairman, is your question about the habeas proceedings or——

The CHAIRMAN. Yes, yes. Excuse me, yes.

Mr. KATSAS. Okay. My strong recommendation to the committee would be to legislate standards, a procedural framework to govern the conduct of what are 250 unprecedented cases. We don't know such fundamental questions as: What are the relevant burdens of proof? What is the nature of our discovery obligations? How is classified information to be protected? Is there an entitlement to live hearings?

So, you have a tremendous potential for disparate rulings as district courts try to work through these issues. You have the possibility of disagreement in the district courts, which will produce large numbers of reversals on appeal, which will slow down the process, not facilitate it. In terms of Justice Department resources, you would force us to relitigate the same set of issues at least 3 times, potentially 15 times, or dozens of times, depending upon the extent of consolidation; and you would risk the courts not striking

the optimal balance between the interests of fairness to individual detainees and legitimate military needs in prosecuting this war.

And, finally, I should just note that there is a 200-year tradition of congressional involvement in shaping the scope of habeas corpus. Statutory direction goes all the way back to the first Judiciary Act. It would not be novel or unusual for Congress to set down standards and guidance, as it always has with respect to habeas, as the Supreme Court invited in *Boumediene*, and, indeed, as Chief Judge Lamberth of the district court has invited in a press release welcoming guidance from this Congress.

The CHAIRMAN. Thank you.

How many detainees are there currently at Guantanamo?

Ms. HODGKINSON. There are approximately 265.

The CHAIRMAN. Two hundred and sixty-five?

Ms. HODGKINSON. Yes, sir.

The CHAIRMAN. How many of that 265 have been formally charged?

Ms. HODGKINSON. Twenty-one.

The CHAIRMAN. Twenty-one?

Ms. HODGKINSON. Yes, sir.

The CHAIRMAN. When were those 21 detainees charged?

Mr. DELL'ORTO. Mr. Chairman, they have been charged over a period of time, beginning in, I believe, February of 2007 through the present. First charges after the—

Well, let me step back. We did have a number who had been charged prior to the Supreme Court decision in *Hamdan* in 2006. There were about, I'd say, somewhere on the order of 5 to 10, although my memory may be off there.

In the aftermath of the Supreme Court decision in *Hamdan*, we and the Congress and the Administration put together the Military Commissions Act. The President signed it, and then we started the charging process over again for some of those detainees. So, some of the 21 who are now charged have been recharged post the Military Commissions Act.

The CHAIRMAN. Will all of the 265—is that correct? Will all the 265 be charged with one charge or another?

Mr. DELL'ORTO. We don't expect that to be the case, Mr. Chairman. The Chief Prosecutor and the prosecutors who work for him will make those decisions, as to which of the detainees will be charged. The convening authority will make a determination about which of those cases will be referred to trial unfettered by any outside influence. Those are decisions that they will make.

We have heard estimates from the Office of the Chief Prosecutor that somewhere in the order of 60 to 80 detainees could be charged. But, again, it is their determination as to which they will charge and what charges will be preferred, and we will have to see how that plays out over the coming year. But I would expect that, since that number has not changed very much, that probably, on the outside, 80, maybe slightly more, could be charged or are anticipated being charged.

The CHAIRMAN. So, you will have either around 200 or slightly fewer that you do not anticipate being charged. Is that correct?

Mr. DELL'ORTO. I think, if I were to do the math, I think that is about right, Mr. Chairman.

The CHAIRMAN. And what will you do with them?

Mr. DELL'ORTO. Well, we have a number of them who have already been cleared for either transfer to their—

The CHAIRMAN. How many would that be?

Mr. DELL'ORTO. That number is about—I think Ms. Hodgkinson has that number.

The CHAIRMAN. How many is that?

Ms. HODGKINSON. Yes, sir, there is approximately 60 individuals at Guantanamo Bay who have already been approved for transfer or release either back to their home country or, in the instances where their home country does not want them or they can't be sent there out of humane treatment concerns or security concerns, then we are seeking a third country.

The CHAIRMAN. So, 60 or so will be released one way or the other. Is that correct?

Ms. HODGKINSON. Our goal is to transfer or release about 60 of them; yes, sir.

The CHAIRMAN. Then you still have—

Ms. HODGKINSON. But we do continue, sir, to have administrative—

The CHAIRMAN [continuing]. 140, 150 that will still be there. Do you anticipate charging them with anything?

Ms. HODGKINSON. Well, I would note that we continue to have the annual administrative review boards, which have been very successful in approving individuals for transfer or release. To date, more than 500 people have gone home under this process and through our diplomatic negotiations. So, those processes will continue at the rate that we have been doing so.

Over the past year, we sent more than a hundred people home under these very procedures, this careful process and these deliberate negotiations with other countries; and we intend to continue to do that for the remaining population that does not at this time intend to be prosecuted.

The CHAIRMAN. So, you will have approximately 140, thereabouts, that will not be charged and are there permanently. Is that correct?

Mr. DELL'ORTO. That number, give or take a few, will be a difficult number to come to a resolution through either the military commission process or the release process, although, as Ms. Hodgkinson indicates, we will continue to try to find ways to either transfer them—likely they would have to be transfers, because my understanding is the threat level for those is so high that they could not be outright released. But you are right. That is a core number, thereabouts, that will be neither charged nor—at least not in the short term—transferred or released.

The CHAIRMAN. Kind of like the man aboard a ship that couldn't get off the ship because he didn't have a country. Is that basically it? They are stuck there?

Mr. DELL'ORTO. Until the end of hostilities.

Again, our basis for holding all of these folks from the outset has been that they are enemy combatants during an armed conflict, much as we have faced in other prior wars. Obviously, this one has gone on longer—

The CHAIRMAN. Are they considered prisoners of war?

Mr. DELL'ORTO. They are not technically—they are not treated as prisoners of war under the Third Geneva Convention. They are considered unlawful enemy combatants who are detained under the laws of war.

The CHAIRMAN. Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman. And I know I join with you in apologizing to our witnesses for this bad timing and this long delay here, and I apologize for getting back a little late here.

Let me just ask you a few preliminary questions about Guantanamo, because I think, to the public, Guantanamo is a place that has been excoriated in the press as a place that people think mistreatment occurs. So my first question is, in your estimation—and I would ask this of all the panelists—are the prisoners, detainees being treated well at Guantanamo? And do you have any objections, or do you see any problems with their treatment?

I just go left to right here. Yes, ma'am.

Ms. HODGKINSON. Yes, I will begin by saying, sir, that we believe that the detainees are being very well treated at Guantanamo Bay. We have taken extensive measures and efforts to ensure that they have the highest standards of care that we can provide, both through medical care and treatment, which has a higher patient-to-doctor ratio than any other facility that we are aware of. We try to ensure that they have regular exercise, and all detainees have recreation opportunities, including sports. They have cultural activities. They have activities that comport with their religious beliefs. And it is our full belief that they have the highest standards of care that we can provide.

Mr. HUNTER. Okay. Anybody disagree with that, that they are well treated?

Mr. DELL'ORTO. No, sir. And I have been down there a number of visits.

Mr. HUNTER. So they are well treated. So there is no——

Colonel DAVID. May I comment, sir?

Mr. HUNTER. Yes, go right ahead. Speak up. Bring that microphone close to you when you are talking. Everybody seems to be real worried about that.

Colonel DAVID. I have been in the camps. This is Colonel David. I have been in the camps. I have met with different detainees. As a Legal Support Office (LSO) commander, I sent my attorneys to work for Joint Task Force (JTF) Gitmo Staff Judge Advocate's (SJ) office. In fact, several years ago I served as the interim SJ for a short period of time with Joint Task Force Guantanamo.

I can say that, with very few exceptions, the men and women who are members of the guard force are members of the medical staff, have provided excellent treatment to the detainees. However, there have been circumstances, there have been occasions when detainees have been mistreated. That has happened.

It has not happened regularly, and I am not talking about the issue of whether or not—certain types of interrogation methods or torture or not. I am talking about mistreatment. That has happened. But it has happened on occasion, not regularly.

The vast majority of the people down there are doing tremendous jobs under very difficult circumstances. But I just wanted to clarify the record, from my perspective, that it is not a 100 percent true

statement in my opinion that they are treated well and have been treated well all the time.

Mr. HUNTER. Well, I asked—the question was: Are they being treated well now? What is your opinion? Do you see deficiencies?

Colonel DAVID. I think there have been occasions, not recently, that they have not been treated as we would like them to be treated, I believe.

Mr. HUNTER. Okay. How long ago?

Colonel DAVID. I think the most recent incident that I am aware of is probably within the last 60 days, sir.

Mr. HUNTER. Okay. What happened?

Colonel DAVID. I am not sure how much I can talk about that in this forum.

Mr. HUNTER. Well, you got us there. You tell us you saw something bad, but you can't tell us what it was.

Colonel DAVID. No, sir, I did not see anything bad. It is information provided to me which suggests that that incident occurred, and we brought it to the attention of—

Mr. HUNTER. Okay. So, if an incident occurs—we assume people aren't perfect, and you are not going to have a prison without having some incident at some point—is disciplinary action taken?

Colonel DAVID. Sometimes that is a little hard to ascertain exactly what happens as an end result. We don't get a full briefing or after action as to exactly what happened. Sometimes that information is a little incomplete.

Mr. HUNTER. How about finding out for us and letting us know?

Colonel DAVID. Certainly.

[The information referred to was not available at the time of printing.]

Mr. HUNTER. You are a little vague on it. So, find out the specific facts—

Colonel DAVID. I am a little vague because I don't have the specifics; yes, sir.

Mr. HUNTER. Well, bring it in and tell it to us.

Now, let me ask you a question about that. My understanding is there has never been a murder at Guantanamo. Is that right? A murder.

Colonel DAVID. That is correct.

Mr. HUNTER. Okay. Is there any other prison in the world, major prison, where there has never been a murder besides Guantanamo?

Colonel DAVID. If you are asking me, sir, I would assume there is not, although I don't know.

Mr. HUNTER. Any of you other folks know of any other prison in the world where there has never been a murder except Guantanamo, major prison? I don't think there is one. I think it has got—in terms of having a capital crime committed in the prison, I think it is the only one in the world where there has never been a murder.

I have heard lots of my colleagues criticize Guantanamo; and I have looked at the records of murders, assaults, and other problems in their particular districts in their state and local prisons; and Guantanamo's record looks pretty sterling compared to it. But I wanted to bring this out, because I think this is the framework

under which we are undertaking this hearing, is that somehow Guantanamo has a stigma.

Is there a practice that we undertake right now that any of you think is—because I was there, and I saw them. I saw us. We read the Koran to them over the loudspeaker system I think—what—five times a day? We provide a taxpayer-paid-for Koran, prayer beads, rugs. I looked at their medical records. They had averaged about a five-pound per person weight gain over the year. Is there any particular procedure that we undertake that you think is an oppressive procedure that we should change, an official procedure? Anybody have a suggestion?

Mr. DELL'ORTO. I have none, Mr. Chairman—or Congressman.

Mr. HUNTER. Then here is my question for you. Outside of geography, that is, the fact that Guantanamo is located where it is, and it is considered to be an extension of American authority because of the geography, is there a good reason to close Guantanamo? Assuming that we are continuing to have this war against terrorists and that we incarcerate people like Khalid Sheik Mohammed, who does say that he planned the attack that killed thousands of men, women, and children, and we have to put him somewhere, and nobody wants him in their congressional district, is there a reason, a compelling reason, for us to close Guantanamo?

Ms. HODGKINSON. Well, the Secretary and the President have consistently stated that we are trying to move toward the day when we can close the facility and are trying to take those efforts that we can to do so, in light of some of the international criticism and other concerns that have been raised over the detention facility.

Mr. HUNTER. We know what they have said, but my question to you is: Is there a compelling reason outside of the geography—because the Court has now attached certain rights to people who are incarcerated in Guantanamo—and most important of which, obviously, is the right to habeas—is there a compelling reason, outside of the geography, to close Guantanamo? If we have good people, as everybody concurs we have, incarcerating these folks—we have good care, good treatment, good food, good health care—is there a compelling reason to close Guantanamo?

Ms. HODGKINSON. The Department of Defense would certainly not be in a position to provide better treatment in another location than the treatment that it provides at Guantanamo Bay.

Colonel DAVID. Just for the record, sir—I don't mean to interrupt you, but I do believe it would be appropriate to close Guantanamo Bay. I don't want to not say that. I don't want to interrupt you.

Mr. HUNTER. That's why I am asking the questions, so you can get your two cents worth in. Why do you think we should close it?

Colonel DAVID. I think, first and foremost, because it is a blight on our legal integrity. And the fact that a detainee at Guantanamo Bay is being fed appropriately, that is wonderful. That is who we are. We are Americans. We are going to take care of people.

But the fact that they do not have the right to counsel until they are charged, the fact that only recently the Supreme Court extended some constitutional rights to the detainees at Guantanamo Bay—I think one can begin to build—and certainly build a case bit by bit by bit—things that have occurred that justifies that, if we

are going to charge someone with a crime that faces a life sentence or death or long time in prison, we can do better than detaining them at Guantanamo Bay, if for no other reason than to make them more accessible to the court system, more accessible to the men and women that need to defend them.

I think the issue may be where we put and how we house the individuals that we never intend to charge and, politically, we may never intend to release. But my function as Chief Defense Counsel is to defend zealously those people that have been charged, and I don't believe Guantanamo Bay is an appropriate place for them to be, and I don't believe that is the best place. And I believe we can do better, sir.

Mr. HUNTER. Okay. So my question to you is—you said they are not being maltreated at Guantanamo Bay, but your complaint is you think the system is mistreating them. We are not treating them. We are not giving them all the rights that you feel they should be given. But that is not something that is driven by geography or where you put them. You could apply the full rights of the Constitution to people at Guantanamo Bay if the country decides to do that, right? In the proceedings for people—that isn't something that is derived from the location. That is something that is derived from our justice system. Is that not true?

Colonel DAVID. It is certainly true from the standpoint of geography. But, again, it is difficult, if not impossible, to apply our laws at this time to the facility, to the operation of the facility, to the due process for those individuals.

Mr. HUNTER. Okay. That is something that is hard to understand here. Why can't you apply the law and any mechanism that is passed by Congress, signed by the President, with respect to either the Detainee Treatment Act or this military justice system or the so-called Terrorist Tribunal Act that we have now put into law? That is not specific to a particular piece of geography. What is the problem here, Colonel? I mean, are you saying that defense counsel don't have a place to stay when they come to Guantanamo, that they don't have access to counsel?

Colonel DAVID. That has been problematic in the past. I mean, unfortunately, I wasn't consulted in the operation. I am not in charge of that.

Mr. HUNTER. Let me ask the other folks. Do you see a problem with defense counsel being allowed access to Guantanamo or having enough quarters or transportation or—

Mr. DELL'ORTO. We have made extraordinary efforts since the charging of these individuals in 2007 to provide support for all participants in the trial process at Guantanamo. We have built a brand new courtroom. We have built—put together temporary quarters for all participants, so that we can provide everyone their opportunity.

Mr. HUNTER. Okay. So, let me do this. Colonel, why don't you get us a defense counsel to contact the committee who says that he tried to travel to Guantanamo or he traveled to Guantanamo and could not find adequate quarters, was not allowed to have a place from which he could operate to defend his particular client. You get us that information. If that is your claim—

Colonel DAVID. My claim is not as it relates to accommodations. We have accommodations. My claim is as it relates to getting to and from. My claim as it relates to most recently is taking down my new counsel for an orientation—expected orientation—of Guantanamo Bay, since they have the appropriate security clearances, and I wanted them to have an opportunity, as the prosecution, to have a briefing, have an orientation, unclassified briefing; only to have that planned and the day before cancelled, because, I was told, it was not appropriate for defense counsel to have that kind of orientation.

But I will certainly get you details, sir.

Mr. HUNTER. Okay. But they have a place to stay.

Colonel DAVID. Absolutely.

Mr. HUNTER. But you didn't get an orientation you wanted to get.

Colonel DAVID. They do have a place to stay, yes, sir.

Mr. HUNTER. Okay. Mr. Dell'Orto, you got a comment on this orientation?

Mr. DELL'ORTO. Sir, I am aware of that particular request. I do know that the response that went back to Colonel David was, if you put it in writing and provide adequate justification, so that a decision can be made based on more than just an assertion that it was going to be an orientation, that that request would be considered.

Mr. HUNTER. You know, we put this law together, and the reason I am taking some time—and I appreciate the chairman's patience—this is a very serious matter and has a lot of depth. We put forth and examined tribunals that have been held in the past, from Nuremberg, Rwanda—and the House and Senate worked on this, Democrats and Republican counsel and non-counsel, and the Members. And we put together a group of rights that we afford the detainees under the Military Commissions Act: the right to counsel, the presumption of innocence, proof beyond a reasonable doubt, the opportunity to obtain witnesses and other evidence, the right to discovery, exculpatory evidence provided to defense counsel. Statements obtained through torture are excluded. Classified evidence must be declassified, redacted, or summarized to the maximum extent possible.

And we had a lot of problems working this, Democrats and Republicans, Senate and the House, because you had the problem of having classified information that the accused had a right to confront, and yet you couldn't give classified information out. We finally worked through it to have it, to the maximum extent, redacted and summarized, so that you could have a fair trial, and yet you could protect classified information.

Statements allegedly obtained through coercion are only admissible if the military judge rules that the statement is reliable and probative. A certified judge will preside over all proceedings of the individual commissions. The U.S. Government must provide defense counsel, including counsel with the necessary clearances to review classified information on the accused terrorist's behalf. That means you don't keep information away on the basis that he doesn't have counsel. And in capital cases, the military commissions, 12 panelists, must unanimously agree on the verdict, and the President has the final review.

Panel votes are secret ballots, which ensures that panelists are allowed to vote their conscience. We did that because we didn't want to have a subordinate officer feeling that he had to follow his superior's vote in a particular vote against a detainee. So we provided for a secret ballot. Right to appeal to a new court of military commissions review and the court of appeals for the District of Columbia and the right against double jeopardy.

Now, I read those to counsel for some of the defendants yesterday, and I asked them if there were any additional rights that they would give to the defendants, any specific rights that they think that we missed. Not one of them came up with one. They talked around it. They talked about they thought they had the basic rights to be afforded full constitutional rights as U.S. citizens, but nobody came up with, "one they thought you missed one here."

Colonel, beyond those are rights, are there additional rights that you think that the defendants should have?

Colonel DAVID. I think it would be helpful if the right to counsel arose prior to three or four or five or six years later being charged and prior to interrogations of any kind, however coercive, or whether they cross into torture.

I also think it would be helpful if some of those rights were played out under the commission's process more openly and transparently than they have on occasion—for example, the right to discovery of evidence, when that discovery is provided to you, either in trial or on the eve of trial—hundreds and hundreds and hundreds of pages—it is difficult to, quite frankly, utilize that right effectively and have that right mean anything without causing prejudice to the accused.

Off the top of my head, I can't think of any other rights, so I probably would be in the same boat as the men and women yesterday. I, certainly, if I have an opportunity and could supplement my testimony, I will do that.

Mr. HUNTER. Certainly.

Colonel DAVID. My only point on those rights, sir, is that there is a difference in theory and in practice, and I am concerned that what looks good at 30,000 feet, when you are on the ground has been tremendously problematic.

Mr. HUNTER. Thank you, Colonel. Let me tell you, courts across the land make mistakes all the time. Lots of plaintiff's lawyers, including myself, have complained that we didn't get timely discovery. And you have a right—when you have discovery, you have a right to timely discovery. Statements obtained by torture are excluded under the law. So, we pass a law, and if it is not followed, of course, that is a reversible error in a case, and you get a reversal. So, carrying out the law is an important thing. If you have any particular incidents of not getting timely discovery, I would like you to get those to the committee. And if you have any further, on reflection, any further ideas on how to make this system more fair and a better forum, please get those to us I think we'd appreciate that.

Thank you, Mr. Chairman, for letting me take some time. The last thing is this: If you have been given the right to habeas, and I have never had a habeas case, but that is basically you are being held unlawfully; the heart of that case, for practical purposes, if

you have been picked up on a battlefield, I would think in a practical way, it is going to be, whether you are a combatant or farmer in the field, you had an AK-47, because you were one of the livestock protectors in a town, and you got picked up on a sweep. You shouldn't be there.

The problem is the details of that are going to be long since—the principles in that military sweep are going to be long since dissipated from the scene, and this is not like a crime scene, where you have a lot of people attend the scene of a crime, and you have lots of expert capability focusing. A lot of these folks are picked up in battlefield operations which are very transitory, very quick, and the idea—if you are the court trying to figure out what you review in the habeas, what do you think?

I would ask maybe Mr. Dell'Orto to answer this, do you see problems with the court being able to figure out what the scope of their review is going to be? You get a guy that was picked up in an Afghan village four years ago, what are you going to be able to do to ascertain the merit of his habeas appeal?

Mr. DELL'ORTO. It will be a difficult process. It will be a question of I would assume the detainee presenting, at some point, his view of why he should not be held, countered by the government's information, which will be largely from battlefield reports—reports filed by those who captured him, who brought him into their custody, matching up intelligence reports that would come from a variety of sources, many of which are going to be very sensitive and highly classified.

They will be the means by which we obtain that information. They will be the sources and methods. In many instances, it will be information coming from foreign governments that want that information protected. And so, while—in the system that we have now, under the Combatant Status Review Tribunal (CSRT) process that we have now, many of those things will be considered by military officers who have some knowledge of what this is all about and, certainly, can assess the intelligence value of the information that has been brought forward.

Judges may not be as able to pour through that and make the assessments that they need to make on that sort of information. And then, if we start getting into what the detainee needs to be provided to allow him to rebut that information, it will be a very, very difficult process of trying to take that classified information and develop an unclassified summary that the detainee can be shown that will satisfy the judge that the detainee has had enough information to permit him to respond. It will be very, very difficult, and it is one of the difficulties associated with this type of warfare.

Mr. HUNTER. Thank you. I know that the chairman is an expert in this area and has tried a lot of cases and has questions in this area too. It looks to me that the practical aspect of laying out a template for what the scope of the review is going to be and whether our guys are going to be able to, the judge is going to be able to really accomplish a meaningful habeas review, is I think questionable; but, thank you.

Thank you, Mr. Chairman, for giving me some time on this.

The CHAIRMAN. You bet.

Mr. Spratt.

Mr. SPRATT. Thank you, Mr. Chairman.

I believe *Boumediene* makes it clear that the detainees at Guantanamo have the right to petition for habeas corpus. Do you believe that the decision also allows them the full panoply of rights that would come to an ordinary defendant seeking habeas corpus? Or is there some diminished status, some diminished bag of rights, collection of rights that they have? Is that part and parcel of the Attorney General's request of us to write the law that we may have the right to diminish the associated rights that they have?

Mr. KATSAS. No. What *Boumediene* says is that the detainees have a right to petition for habeas corpus. The Attorney General——

Mr. SPRATT. Let me ask you: can Congress take constitutional rights away? If this is a constitutional right, the right to habeas corpus, can we diminish it?

Mr. KATSAS. You can't eliminate the right to habeas corpus. You can certainly pass statutes that define the procedures to be used, the standards of proof. You have done that with respect to habeas corpus.

Mr. SPRATT. Does the Department take the position that Congress has the authority to strip courts, federal courts, of the right to review habeas corpus petitions?

Mr. KATSAS. The Supreme Court has struck down a strip. What we are now proposing is legal standards to govern the exercise of the detainee's habeas corpus rights. And I should add that the Attorney General's specific proposals are consistent with all of the rights recognized in *Boumediene* and all of the rights previously recognized by the Supreme Court in *Hamdi*.

Mr. SPRATT. Let's take coercive testimony, evidence obtained through coercive means. Is that admissible on the same basis that it would be admitted or excluded in non-detainee cases, in ordinary criminal cases?

Mr. KATSAS. Evidence improperly seized, obtained, would be excluded.

Mr. SPRATT. What about the right to confront those who have made accusations against you?

Mr. KATSAS. Confrontation rights of the sixth amendment would not apply because enemy combatant proceedings are not criminal proceedings, and the sixth amendment, even for citizens in this country, applies only to criminal prosecutions.

Mr. SPRATT. So, there is no right, then, to have witnesses who have made charges, accusations, against you personally, confront you face to face in open court?

Mr. KATSAS. If that means the only way to support a detention is for service members to be summoned back from the battlefield to give eyewitness testimony, as opposed to a hearsay affidavit, we think the answer is and should be "no," as the Supreme Court recognized in the *Hamdi* case when it specifically said that use of hearsay in these circumstances would be permissible.

Mr. SPRATT. What about exculpatory evidence as a matter of fairness? Should the defendant have access to it, including detainees here, or is their right to exculpatory evidence somehow less than the right of an ordinary criminal defendant?

Mr. KATSAS. The essence of the habeas proceedings that the Supreme Court has mandated is that the detainee be able to put on whatever evidence he wishes. We don't think that that entails the right to compel the government to search through all of its records worldwide for any evidence that might exist anywhere due to classification concerns, burdens on the military, and the lack of any precedent for applying that kind of criminal standard in these very different enemy combatant proceedings.

Mr. SPRATT. So, what we are saying is that although the court has ruled that the detainees have a right to habeas corpus, once they exercise that right and try to show that they are not guilty of anything that would justify their being further held, their procedural rights are less than the procedural rights of an ordinary criminal defendant in the federal courts?

Mr. KATSAS. Absolutely Mr. Spratt. The Supreme Court in *Boumediene* said explicitly that the extent of procedural protections in habeas corpus proceedings need not track the extent of protections in criminal prosecutions in domestic Article three courts. They were quite explicit on that point.

Mr. SPRATT. *Boumediene* holds that?

Mr. KATSAS. *Boumediene* does not definitively answer the question of how much procedure the detainees are entitled to, but it does say that the procedure need not match the amount of procedure for a domestic criminal trial.

Mr. SPRATT. Colonel David, how do you read the decision?

Colonel DAVID. Excuse me, I believe the decision is clear that neither citizenship nor sovereignty status is dispositive. Instead, the Court quoted whether a constitutional provision has extraterritorial effect depends on the particular circumstances and practical necessities and the possible alternatives. I think they were not satisfied with the alternatives. They made it clear that habeas will extend, and I think there is certainly a precedent there that other constitutional rights will apply to the detainees charged before the commissions in Guantanamo Bay.

As I stated earlier, and if necessary, those will be litigated one by one. But I certainly believe it is a broader right reading.

Mr. SPRATT. Mr. Katsas, the Attorney General sent us a letter on July 21 with six key points that he would like to see in legislation that the Congress writes. The first is that the law should prohibit federal courts from ordering the government to bring enemy combatants into the United States. What is the purpose of that?

Mr. KATSAS. The purpose of that is safeguarding the security of this country. It seems unwise to allow potentially dangerous people into the country to roam free in our midst.

Mr. SPRATT. They would be in the custody of the military, would they not?

Mr. KATSAS. They may or may not be in custody. I would think that other things being equal, custody at a secure foreign military base on a remote island is safer than custody in New York City or Washington, D.C.

Mr. SPRATT. Thank you very much.

The CHAIRMAN. Mr. McHugh from New York.

Mr. MCHUGH. Thank you, Mr. Chairman.

Gentlemen, I want to pursue Mr. Spratt's last point a little bit. I would preface it by saying that I think the very interesting discussion between Mr. Katsas and Colonel David as to what this court decision conveys with respect to constitutional rights and what the provision of habeas means here, given the absence of guidance by the court, which is also at the crux of all four of the dissenters in this case, show the peril in which this case has left us, because we truly don't know what this ruling means in terms of conveyed rights. Colonel, I respect your opinion, and you may well be right that there is a clear indication that these combatants being held are entitled, under our Constitution, to additional rights; and while I would say to Mr. Katsas I would probably agree with your analysis and your arguments as to what you believe, I suspect before *Boumediene* came down, you believed there was no right to habeas either, so we don't know.

Let's talk about the 60, roughly, individuals at Guantanamo who we expect, at some point, will have no status there. They have been processed and ready for release, but they have nowhere to go, either because, for our purposes we would not release them to certain countries or, for other reasons, other countries would not take them. Is there not at least a question of uncertainty, at some point, in a process of habeas, a judge will be looking at this as a result of the *Boumediene* decision and will say, "You must release these people into the United States"? Is that not a possibility?

Mr. KATSAS. Absolutely. It is a possibility. We have one pending motion in which a detainee has requested precisely that.

Mr. MCHUGH. Would that now take us back to Attorney General Mukasey's first point that he is concerned about that possibility? Those people could—and I assume in that circumstance would not be under custody—they would be free to roam; true?

Mr. KATSAS. The request is for release into the country.

Mr. MCHUGH. Colonel, would you disagree with that analysis, that potential?

Colonel DAVID. I think, certainly, the potential is there.

Mr. MCHUGH. Thank you. Colonel, I tried to follow very carefully the discussion with the ranking member with respect to the facility at Guantanamo. And quite frankly, I tended to agree with the ranking member that the concerns you have weren't necessarily embedded into a facility per se. They were largely procedural, although I recognize there is a geography issue in transport and such that you have. But I made an assumption as to what I believe your position was, and I don't think making an assumption on your position on my part is fair, so I want to ask you.

My assumption is, listening to what you said, you would believe that the only fair location in which to operate this kind of system and have this kind of facility would be in the continental United States (CONUS), in the United States. Am I making a correct assumption?

Colonel DAVID. Yes, sir. With respect to those detainees being charged, my opinion would be that they could be transferred to and tried within the federal criminal justice system or under the Uniform Code of Military Justice (UCMJ) or even under some quasi-special court.

Mr. MCHUGH. Here in the United States?

Colonel DAVID. Yes, sir.

Mr. MCHUGH. Thank you. I am glad we got that on the record. I didn't feel it was fair to assume that.

The other assumption, but I want to give you a chance to more clearly define—I also heard you say, but before that—I was assuming your belief is that *Hamdi* suggests very clearly that the detainees at Guantanamo have a wider range and, as you just said, will be argued and ultimately held that they have a wider range of constitutional rights than just this narrowly defined habeas; true?

Colonel DAVID. Yes, sir. I think that issue is obviously not answered.

Mr. MCHUGH. I am asking your belief?

Colonel DAVID. Yes, I do believe it.

Mr. MCHUGH. Thank you.

Mr. Dell'Orto, you said in the beginning in your statement—you read it here—that the dual-track process provided under this ruling, as well as that provided under the Detainee Act, provides to those detainees more appellate rights than a United States citizen?

Mr. DELL'ORTO. Yes, sir.

Mr. MCHUGH. I want to be clear for the record. I would argue it also affords more rights of appeal than are afforded to the people who are guarding them, the men and women who wear the uniform of this country. Would you agree with that?

Mr. DELL'ORTO. Yes, sir. And if I could append a point on your previous question, in point of fact, if you take Colonel David's argument to its logical conclusion, he would be arguing that by virtue of this decision, a detainee at Guantanamo has more rights under the Constitution than our service men and women have under the Uniform Code of Military Justice, because there are certain constitutional rights that are constrained under the Uniform Code of Military Justice.

Mr. MCHUGH. In fairness to the Colonel, I didn't hear him say all constitutional rights are conveyed. But I appreciate your comment.

Mr. Chairman, just one more question.

Thank you, sir.

I would say to Mr. Katsas: I think your analysis of the conveyance of the right to confront—and by the way, for the record I dropped out of law school after 10 days, so jump in here and correct me at any time—but from my limited knowledge, that the right of confrontation under the sixth amendment is normally considered a civil finding and would not be applied here, you would argue. You and I would agree in that argument. But would I be wrong to be concerned that, thereto, there could be a court determination in the future, as they fill in these considerable blanks left by this decision, that that right of confrontation should be extended to detainees? Does that concern you?

Mr. KATSAS. In the habeas proceedings or in the prosecutions?

Mr. MCHUGH. Either.

Mr. KATSAS. In the prosecutions, that is an open question, but the Military Commissions Act already provides confrontation rights by statute.

Mr. MCHUGH. If it were provided under a sixth amendment right, a right that we would argue is not yet extended but could

be as the blanks were filled in, it is my understanding that a true confrontation under the traditional aspects would be held here in the United States in federal court over on Constitution Avenue. Is that true?

Mr. KATSAS. If the proceedings were conducted here—

Mr. MCHUGH. Is that not standard procedure in a sixth amendment confrontation before federal court?

Mr. KATSAS. The habeas proceedings would be conducted here. If confrontation rights were extended, then the detainees would be here in Washington, D.C. at Third and Constitution, Northwest.

Mr. MCHUGH. Mr. Chairman, in closing, I would say, look, Colonel David is doing a great job in representing the interests of his clients, and I feel certain he comes committed to his passion, and he probably has points that need to be carefully considered, but I refer in closing to the Attorney General's comments. And without saying he is all right or all wrong, I think these are points that we have to carefully consider. In my opinion, there are far too many blanks here in far too many important ways, as is embedded in much of the dissent opinions, for those who have read it—that it is incumbent upon us to step in and be heard and fill in some of those blanks that I think cry out for definition.

That is why this hearing is important and why I, personally, deeply appreciate all four of you being here. Thank you all for your service and patience, too.

The CHAIRMAN. Thank you very much. Mr. Murphy.

Mr. MURPHY. Thank you, and I agree with Mr. McHugh on his past statement.

Mr. Dell'Orto, I know you are an Army officer for 27 years, and I appreciate the whole panel for being here. I do want to mention that you actually get more rights as a soldier, as you know, when it comes to criminal law, whether it is fifth amendment rights because you have the article 31(b) rights as compared to Miranda, and you get sixth amendment right to counsel in the military, as compared to in the civilian world, where you have to be indigent to get a right to counsel free of charge. You get free attorneys in the military.

I know you don't give first amendment freedom of speech rights and others. I know you are a Notre Dame grad. I went to King's College, another Holy Cross school, but you went on to Pepperdine and St. John's and Georgetown, and I don't want to match wits with you or with the board. I was just a lowly constitutional law professor for West Point before I got this gig.

Going to my question, Mr. Katsas, pursuant to the authority granted under the Authorization for the Use of Military Force (AUMF), do you believe that an old lady in Switzerland who sends a check to an orphanage in Afghanistan can be taken into custody as an enemy combatant if, unbeknownst to her, some of her donation is passed to al Qaeda terrorists?

Mr. KATSAS. I don't. And I should add that Judge Green, whom you were quoting, went on to say that she believed that that hypothetical does not describe any Guantanamo detainee.

Mr. MURPHY. Then, you disagree with the statement of Deputy Associate Attorney General Brian Boyle, who, in federal district court in 2004, responded to that very question just asked you by

saying that the grandmother could be held because “someone’s intention is clearly not a factor that would disable detention.”

So, I am puzzled. What is the government’s formal position to the outer limit on who can be detained under the AUMF?

Mr. KATSAS. Under the AUMF, nations, organizations, or persons who committed the September 11 attacks or harbored those who did are proper objects of military force, including detention. In general, what that means at a minimum is that al Qaeda fighters and Taliban fighters can be detained, because al Qaeda is the organization that committed the attacks, and the Taliban is the armed force of the Nation that harbored al Qaeda.

I fully agree with you to the extent your line of questioning suggests that there will be difficult questions at the outer bounds of who counts as al Qaeda. What happens to someone who is not actually fighting but writing checks? Is someone who occasionally writes a check different from someone who looks more like an Army paymaster?

The existence of those hard questions at the outer margins, I don’t think changes the fundamental point that Taliban and al Qaeda fighters are subject to detention, and our fundamental concern is with the core principle, because, as I said in my opening remarks, we had four out of nine judges on the fourth circuit conclude that no member of al Qaeda could be detained, not even Osama bin Laden.

Mr. MURPHY. Which is a minority?

Mr. KATSAS. A bare minority. Four out of nine.

Mr. MURPHY. Colonel David, do you believe that the AUMF applies to individuals who have no direct connection to al Qaeda or the Taliban and have not engaged in belligerent acts toward the United States?

Colonel DAVID. With that general proposition, I would hope so.

Mr. MURPHY. Thank you.

In response to the *Boumediene* decision, Attorney General Mukasey called on Congress to pass legislation that basically codifies the Administration’s broad and, in my opinion, constitutionally suspect definition of who the government can detain as an enemy combatant pursuant to the AUMF. We are trying to find a balance here. Obviously, we are looking at the spectrum. One the one hand are the Miranda rights on the battlefield, which no one on this committee and 99 percent of us in America don’t agree that when you are fighting enemy combatants, they don’t get constitutional rights on the battlefield, and we don’t give them Miranda warnings, or article 31(b) warnings, as we call them in military justice.

But on the other hand—I think most Americans say this—and we have hundreds of folks who have been detained in Guantanamo Bay for over six years now, and what is going on with them, and that is why we had this decision—grant them a habeas corpus.

With all due respect to the Attorney General’s proposal, I don’t think it is serious or realistic, and he knows full well that this Congress will not approve legislation granting the government power that broad, nor, in my opinion, should it.

As Judge Wilkinson of the Fourth Circuit Court said, who I think you would agree is a conservative judge—he said of the al Marri case, “To turn every crime that might tenuously be linked to ter-

rorism into a military matter would breach this country's most fundamental values."

I think the American people, Mr. Chairman, are tired of blatant partisanship from this Administration, which has been displayed too many times when it comes to national security issues over the past seven years. We are trying to find a proper balance. So, could the panel please give this committee a realistic idea of how future bipartisan legislation would define who exactly the government can detain, while not breaching our country's most fundamental values? I would ask the panel to please answer that question.

Mr. KATSAS. The Administration agrees with the quote from Judge Wilkinson that you just read. The Attorney General, I am pretty confident, would not disagree with it. I think a good start would be confirming the power of the military to detain members of al Qaeda, the Taliban and associated forces.

Mr. MURPHY. I would agree with you. I think we can all agree that if it is an al Qaeda member or a Taliban member or anyone who harbors al Qaeda or Taliban, we want to be able to go after them. No one in this room is disagreeing with you.

What we are arguing, though, is how do you find out if they are Taliban or al Qaeda? And how tenuous of a connection does it have to be?

Mr. KATSAS. On the question of how tenuous the connection has to be, no doubt there are hard questions on the outer bounds of that. And if you were to try to specify a more precise definition of who is sufficiently related to al Qaeda to be subject to detention, we would be happy to work with you on that.

Mr. MURPHY. With all due respect, you are a member of the Administration. We are asking for your professional opinion here as we are trying to craft very important legislation that is dealing with the very important issue dealing with national security. We are asking for your professional opinion. Give us a realistic idea of how—in the future, what kind of bipartisan legislation do we need? How do we move forward from here?

Mr. KATSAS. Sorry. I think I just gave it to you. My professional opinion is that it would be both constitutional and prudent to confirm the military's authority to detain al Qaeda, Taliban, and associated forces. And to come back to your other question about how do we determine who falls within that circle, the Supreme Court has spoken. The answer is through habeas corpus proceedings; and now the task, I hope, for the political branches working together, is to spell out the details of how those proceedings should be implemented.

Mr. MURPHY. Part of the issue, and we had a very important hearing yesterday—and I think it was Neal Katyal who said only half of a single trial was completed after seven years of the existence of Guantanamo Bay. You know, there is an argument whether or not we should have a national security court. There are a lot of issues we are trying to wrap arms around. I would ask the other members of the panel if they would like to answer.

And I know Sandra Hodgkinson. We served at the same time in Iraq together. I know you were on the civilian side. I was south of you. Unfortunately, I didn't get a chance to live in the green zone, although that was not nice duty; don't get me wrong. I used to

bring my legal team there to swim in the pool, because we didn't have showers at the time we worked. We were a bunch of paratroopers, and we didn't smell too well. I know you have the experience, as well, being a JAG attorney. And if you have a comment on my question, I would appreciate to hear it.

Ms. HODGKINSON. One thing that I think is important to note, and I know we are talking a lot about *Boumediene* and Guantanamo, but we have captured as you know well over 100,000 people since the beginning of this particular war. And a very small number, through battlefield screening, ever ended up at Guantanamo Bay. So, while we agree it can be difficult to define who fits within these narrow definitions, the hope is that after different levels of hearings, whether they are battlefield or combatant status tribunal or an administrative review board, gets us to a degree of more confidence that at least we are holding the people who pose a real threat to us; because I want to assure everybody here in the room that we have no desire to hold anybody who doesn't fit in that category or pose a threat to the United States.

As we move forward, I think there have been a lot of issues addressed in the Attorney General's testimony and, also, discussed here about practical ways to ensure that these habeas proceedings can proceed as quickly and efficiently as possible, to have those very determinations made, so that we can move forward and the decisions can be made by the courts. In the meantime, I can assure you that we are going to do everything we can to continue to transfer out those detainees that can be transferred from Guantanamo Bay and to continue to try to shrink the population as we look at the other alternatives that are out there.

Mr. MURPHY. Anyone else?

Mr. DELL'ORTO. Congressman, in terms of the definition, I would suggest that you might want to look first at section 948(a) of the Military Commissions Act, which, obviously, was passed by Congress in 2006 and signed by the President shortly thereafter. From the standpoint of jurisdictions of the military commissions, that gives you a definition which is very similar to what was adopted very early on for the purposes of the combatant status review tribunal process. And so those definitions are out there, and we think that they are operable definitions, and we think that they have served us well to date in the war on terror.

Mr. MURPHY. Colonel David.

Colonel DAVID. My concern right now is what happens to those individuals that are charged. I think we all agree, or at least I hope we agree, that when all is said and done, whether you are a prosecutor or defense counsel, the discussion centers on, gosh, the evidence I could have called or the witness I could have called or something I could have done differently and whether someone is found guilty or not guilty and what the sentence is—the discussion is about that and not, for years to come, about the process or the flaws in the process or the problems with the process.

I think that is a goal we all share. The problem is how we get there, and the concerns we are trying to bring forth, in the litigation and in any form we can, is that the process, the commission's process, has flaws.

I am concerned. I don't want anyone murdered in prison, but I don't want someone dying there of old age because they have been held there for an extended time without due process. I think we are better than that. I don't envy your challenge.

Mr. MURPHY. Along those lines, Colonel, yesterday we had testimony from Colonel Morris Davis from the Air Force, and he quoted the prosecutor from the World War II saboteur case. In 2001, right after the 9/11 attacks—and his name is Mr. Cutler—he said, after 2001, that we know more about the United States on how we prosecute al Qaeda members, and that will say just as much about us as it will say about al Qaeda.

Colonel DAVID. Sir, I am just a small town Indiana boy, but I wouldn't want to drive a 1940's vintage automobile, and I wouldn't want to be operated on in a 1940's vintage hospital. So, I think, as painful as it may be for us as a country, in the long run, giving the detainees 21st century legal rights is the right thing to do, so we can stand up in front of the world. We did it right, and we have no excuses, and we are not subject to ridicule and criticism, and our legal integrity is maintained, and we have defended the rule of law. I think that is what we are about.

Mr. MURPHY. I yield back to the chairman. For those folks home watching, the chairman is a former county prosecutor in Missouri and a military historian, and I just want those people home in America to realize that we are not asking to give any type of Miranda rights on the battlefield. If it is al Qaeda or Taliban, we want to prosecute them to the fullest extent, and that is an appropriate judgment if that is the case. But at the same time, if there are people who are locked up in Guantanamo Bay that were there for wrong reasons, whether they were turned over because they got a bounty or whatever reason, now that they have the rights under habeas corpus, which I think we should have passed as a Congress—we didn't get there, even though we have legislation and it hasn't come up for a vote; but we are getting after it now, and it is something that I am very proud of.

I yield back to the chairman.

The CHAIRMAN. I thank the gentleman.

Mr. HUNTER. Mr. Chairman, if I may.

The CHAIRMAN. Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

Once again, Colonel, you talked about 21st century rights. The right to have counsel is a 21st century right. The right to be convicted beyond a reasonable doubt is a 21st century right.

These 15 rights that I enumerated which so far nobody has been able to expand upon, including you, are 21st century rights. And of course, we expect the system to carry those rights out. Now, if you see people not carrying those rights out, we expect to know about that. But I don't want to let this hearing conclude with the idea that somehow we are summarily convicting people without affording them their rights. We are not doing that.

And I also know that we have given a free pass to people who were incarcerated in Guantanamo Bay, and they have gone back, picked up arms; and they have tried to kill Americans on battlefields. That is people who come from Mr. Murphy's town and people who come from my town in San Diego, and the people who come

from the chairman's towns, and we have an obligation to the people who fight on the battlefield to make sure that the guys that they have given blood, sweat, and tears to bring those people in when they capture them—and the idea of us having a system where tie goes to the runner, and we jettison those people back to the battlefield to make ourselves feel good, instead of warehousing them for the duration of the war, is a disservice to them.

I appreciate the panel being here, but I also appreciate the fact that we did put a bill together. I think it is a good bill. I notice that the Colonel, who was with us yesterday, said that he thought that the Military Commissions Act (MCA) is a good basis for the prosecution of people who are accused of terrorism against the United States. I want to see these prosecutions continue. I think we all do. I think everybody here does. I want to thank the panel for being with us.

Last, I think it is a real mistake for us to close Guantanamo because the rest of the world doesn't like it. The rest of the world goes behind closed doors after Americans go out to the far reaches of the world and risk our lives trying to bring these guys to justice. And they breathe a sigh of relief after the Americans do it. Then they can hold press conferences and say that we didn't give Khalid Sheikh Mohammed all of the rights that he was entitled to while our guys were out there risking their lives to bring him in.

I think we have done a pretty darn good job of this so far, and I think it is a mistake for our political figures, including those in my party, to say that they are going to close Guantanamo to somehow do away with this image that has falsely built up around this system of justice.

Thank you, Mr. Chairman, thanks for having the hearing today.

The CHAIRMAN. Back to the legislative issue.

There is a law on the books called the Classified Information Procedures Act. The Attorney General mentioned in his speech before the American Enterprise Institute that there should be legislation in relation to habeas corpus proceedings that are related to the status of detainees, that the Classified Information Procedures Act is inadequate. I am asking Mr. Katsas: Upon what basis does the Attorney General make that assertion?

Mr. KATSAS. The Classified Information Procedures Act governs criminal trials, outside the wartime context, in domestic Article 3 courts. The question before you today is appropriate procedures for wartime status determinations in a non-criminal context for aliens captured and held outside the country.

The fundamental problem with applying the Classified Information Procedures Act in this very different context is that, ultimately, the Classified Information Procedures Act, in many cases, puts the government to the Hobson's choice of either revealing classified information or letting somebody go in any case where a judge finds that there is no adequate substitute for classified information. That might be an appropriate burden to impose on the government in the context of criminal prosecution. We don't think it is an appropriate burden in the context of fighting a war.

The CHAIRMAN. Has the Classified Information Procedures Act been used in any of the trials thus far? Regarding terrorism, of course.

Mr. KATSAS. In the habeas hearings or the prosecutions?

The CHAIRMAN. No, in the actual prosecution.

Mr. DELL'ORTO. We have the version of the Classified Information Procedures Act that is different for military commissions that was passed by Congress in the Military Commissions Act.

I don't believe we have actually had to employ those procedures yet in the trial that is underway at Guantanamo at this moment. I could be wrong on that, because I don't follow the day-to-day happenings in that particular court. So, I could be wrong on that, Mr. Chairman, but I don't believe we have had to employ those procedures yet.

Mr. KATSAS. And I should add it has not yet been used in the habeas proceedings involving detention challenges, although detainee counsel have asked for something like it.

The CHAIRMAN. Despite that, if your Department has recommendations along this line, we would appreciate additional information on it for us, because it could pose a problem in the future.

Mr. KATSAS. We would be happy to do that.

The CHAIRMAN. Colonel David, you might be interested in knowing that country lawyers do think alike, and you have some country lawyers up here listening to your testimony today.

Gentlemen, thank you for your patience and your testimony. It has been very, very helpful. I know it has been a long day for you, but this is a most important subject for us to be considering, and we will obviously be looking at your testimony in the days ahead. Thank you so much.

The hearing is adjourned.

[Whereupon, at 5:35 p.m., the committee was adjourned.]

A P P E N D I X

JULY 31, 2008

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 31, 2008

Opening Statement of Daniel J. Dell'Orto, Acting General Counsel, Department of Defense, to the House Armed Services Committee on July 31, 2008

Thank you, Mr. Chairman, Ranking Member Hunter, and Members of the Committee for the opportunity to testify on the "Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba."

The Department of Defense is working diligently to satisfy the considerable litigation requirements stemming from the Supreme Court's decision in *Boumediene v. Bush*. The ramifications of that decision for the Department of Defense and our nation are significant. The Department already has experienced some of these ramifications while others are looming in the near future and still others are as yet unknown. As significant as *Boumediene* is, it is only one in a recent line of decisions that establish an unprecedented level of judicial involvement in matters historically and, in the Department's view, appropriately, reserved to military professionals, including decisions on whom to detain as enemy combatants in an ongoing armed conflict.

There are currently more than 250 petitions for the writ of habeas corpus pending in federal district court that involve more than 300 current or former Guantanamo detainees. Now that the Supreme Court has ruled that these petitions may proceed, the Department is diverting personnel and assets from other ongoing missions to respond to them. Those diverted are not just legal personnel and administrative assets. We also have diverted, or are in the process of diverting, substantial numbers of intelligence assets to support this litigation.

The Department's immediate challenge is that what the law requires is currently unclear. As the Attorney General noted in a July 21, 2008 speech, the Supreme Court explicitly left many questions unanswered in *Boumediene*. The Court said that Guantanamo detainees have a constitutional right to pursue habeas proceedings in federal court. The Court did not say how these cases would proceed or what procedures and standards would apply. Given this lack of direction, and in the absence of legislation, the rules governing habeas proceedings for detainees at Guantanamo will be devised on an ad hoc basis in federal district courts.

Although we do not know what the federal district courts will decree as the ultimate requirements for these proceedings, we anticipate a number of potential problems.

First, these habeas proceedings could require the diversion of significant operational, law enforcement and security resources in addition to administrative, legal, and intelligence resources. In addition to the significant resources the Department already is devoting to this litigation, if judges order the in-person appearance of detainees at hearings, numerous security assets would need to be devoted to the task. As alarming, if federal district court judges issue subpoenas requiring in-person testimony of those who gathered the relevant information pertaining to a habeas petitioner, combat troops, intelligence personnel, and other critical military and civilian personnel may need to be pulled from the theater of combat operations and sent to Washington, D.C., to answer questions from detainees' lawyers. As Justice Jackson presciently noted in *Johnson v. Eisentrager* in 1950,

“It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”

Indeed, the Supreme Court, in *Boumediene*, acknowledged that the conduct of habeas proceedings for Guantanamo detainees could raise national security issues.

Second, the rules for habeas proceedings could affect how our soldiers, sailors, airmen, and marines fight on battlefields around the world. It must be emphasized that petitioners in these cases have been detained under the law of war during an ongoing conflict. These are not the typical habeas proceedings in a civilian context, with which the federal judiciary is familiar. Judges could require arrest reports, chain-of-custody authentication reports, or other evidentiary processes. Rulings that evidence must be excluded or that a detainee must be freed because certain evidentiary processes, relevant to a civilian but not a wartime environment, were not followed, would, in effect, serve to regulate our troops on the battlefield, just as judges, in effect, regulate the local police in civilian life.

Third, habeas proceedings could be used as a vehicle for detainees charged with war crimes to attempt to halt or delay their military commission trials. The Supreme Court ruling in *Boumediene* was focused on challenges to the lawfulness of detention, not on military commission procedures as provided in the Military Commissions Act. Further, the Court looked favorably on the adversarial proceedings of prior military commissions. Although a federal district court judge recently rejected the effort of one

detainee to block his military commission trial, another detainee already has filed a court challenge to stop his military commission from moving forward, and others almost certainly will follow. As the Attorney General explained, Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants.

Finally, the Supreme Court, while providing access for detainees to the federal district courts for habeas proceedings, let stand the alternative route to the Court of Appeals for the District of Columbia Circuit Court under the Detainee Treatment Act. Detainees now have two separate, and redundant, legal channels through which they can challenge the legality of their detention, one under the Detainee Treatment Act and the other under the Constitution. This dual track challenge to detention only serves to strain the resources of the Department further, providing detainees greater opportunities to challenge their detention than those that are available to U.S. citizens imprisoned in the United States.

These are but a few of the concerns we have about Guantanamo detainee habeas proceedings and their consequences for the Department. We recognize that there are opposing considerations and that writing the rules governing these habeas proceedings will require a difficult balancing of many interests. The Department acknowledges and respects the judgment and expertise of the federal courts; however, Congress is best suited to conduct this balancing and to write the rules for habeas proceedings for detainees at Guantanamo Bay.

The federal district courts do not have the institutional competency that Congress has to address these questions effectively and efficiently, appropriately taking into account national security concerns and the potential impact on ongoing military operations. Further, judges might impose conflicting rules, putting the Department in an untenable position, at least until those differences can be resolved in higher courts after considerable delay and uncertainty while the War on Terror continues. Although the DC District Court is attempting to coordinate the cases to some degree, many substantive issues likely will be determined by multiple judges in individual cases. Finally, unlike Congress, federal judges cannot consider and refine the entire statutory framework of Guantanamo detainee legal process. By providing rules for habeas proceedings, Congress can ensure that habeas proceedings do not delay trials by military commission and justice for the victims of the September 11, 2001 attacks. Congress can ensure that the government does not waste resources litigating and relitigating the very same issues in the more than 250 pending habeas petitions and in the more than 190 cases in the United States Court of Appeals for the District of Columbia Circuit under the Detainee Treatment Act. Legislation, not litigation, is the best vehicle for writing these rules.

The Department of Defense fully supports the six specific principles that the Attorney General suggested should guide the legislation of rules for habeas proceedings for detainees at Guantanamo Bay, Cuba.

First, Congress should make clear that federal courts may not order the Government to bring, admit, or release those detained at Guantanamo Bay into the United States.

Second, Congress should ensure national security secrets are protected and that terrorists do not use these proceedings as a means to discover what we know about them and how we acquired that information.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes.

Fourth, Congress should explicitly reaffirm that the United States remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations and that the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures adapted to the realities of national security. To eliminate duplicative efforts and inconsistent rulings, one district court should have exclusive jurisdiction over these habeas cases, and common legal issues should be decided by one judge in a coordinated fashion. Military servicemembers should not be required by subpoenas to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should suffice. Military servicemembers should not be required to create such documents as the arrest reports and chain-of-custody logs that civilian law enforcement entities use.

Sixth, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. Congress should eliminate statutory judicial review under the Detainee Treatment Act. Congress should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of U.S. custody.

Along these lines, the Department of Defense requests that legislation expressly confirm that the habeas jurisdiction of the federal courts does not extend beyond the holding of *Boumediene*. We believe this proposition is reflected in the current law following *Boumediene*, which extended constitutional habeas jurisdiction based on the unique circumstances prevailing at Guantanamo Bay. It goes without saying, however, that all of the difficulties that we face with respect to the Guantanamo habeas petitions would pale in comparison to the difficulties we would encounter were federal court jurisdiction extended to those detained near a zone of active hostilities, such as in Iraq and Afghanistan. The burden of litigating the petitions of some 270 some detainees at Guantanamo is considerable, but the prospect of litigating the petitions of multiple hundreds of alien detainees in Afghanistan and tens of thousands of alien detainees in Iraq would simply be crippling. The Constitution of the United States hardly contemplates such a result.

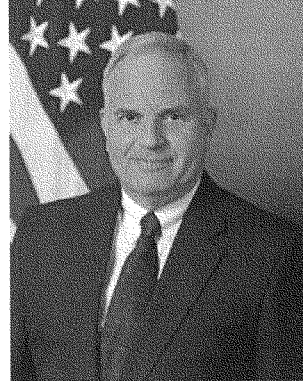
Although the topic of today's hearing is the "Implications of the Supreme Court's *Boumediene* Decision for Detainees at Guantanamo Bay, Cuba," I have begun by discussing the implications of *Boumediene* for the Department of Defense. In my current position as Acting General Counsel of the Department of Defense, as in my previous career as a judge advocate and Army officer for more than 27 years, my foremost duty has always been to our troops—to ensure that they can lawfully do what is necessary to fight and win our nation's wars and to defend our nation from attacks, whether those attacks come from adversary nation states or from non-state actors, such as al Qaeda. We must remain mindful that the enemy we face today and have faced since the early 1990s

uses 21st century technology to perpetrate brutal, indiscriminate attacks on civilians. As the Congress considers legislation in response to *Boumediene*, and weighs the many important interests at stake, I trust that you will carefully consider this as well. Thank you.

BIOGRAPHY

DANIEL J. DELL'ORTO

**Acting General Counsel
Department of Defense**



Daniel J. Dell'Orto is the Acting General Counsel for the Department of Defense. He has served in this capacity since June 2008. He also served as the Acting General Counsel of the Department of Defense from January 19-May 23, 2001. Before serving as the Acting General Counsel, Mr. Dell'Orto served as the Department's Principal Deputy General Counsel since June 2000. He provides oversight, guidance, and direction regarding legal advice on all matters arising within the Department of Defense, including the Office of the Secretary of Defense.

Prior to joining the Department of Defense General Counsel's Office, Mr. Dell'Orto served as the Principal Deputy General Counsel of the Department of the Air Force, a position to which he was appointed in December 1998. Before that appointment, Mr. Dell'Orto served as an Army officer for more than 27 years. After his commissioning and initial assignments as a field artillery officer, he attended and completed law school under the provisions of the Army's Funded Legal Education Program. Thereafter, at assignments in the United States, Germany, and Korea, he served in a series of positions as a judge advocate, including prosecutor, defense counsel, appellate attorney, trial judge, appellate judge, and chief of the worldwide Army Trial Defense Service, culminating with his assignment as the Military Assistant to the Department of Defense General Counsel. He retired in the grade of colonel.

His civilian education includes a Bachelor of Science Degree in Aerospace Engineering from the University of Notre Dame, a Master of Business Administration Degree from Pepperdine University, a law degree from St. John's University School of Law, and a Master of Laws Degree from Georgetown University Law Center. His military education includes the Army Field Artillery and Judge Advocate Basic Courses, Airborne School, the Judge Advocate Officer Graduate Course, the Army Command and General Staff College, the Armed Forces Staff College and the Army War College.

While on active duty, Mr. Dell'Orto was awarded the Defense Distinguished Service Medal, the Legion of Merit (two awards), the Meritorious Service Medal (four awards), the Joint Service Commendation Medal, the Army Commendation Medal, and the Army Achievement Medal. In 1985, the American Bar Association honored him as the Outstanding Young Military Lawyer of the Army. In his civilian service, Mr. Dell'Orto has received the Department of Defense Medal for Distinguished Public Service and the Department of the Air Force Decoration for Exceptional Civilian Service.

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Department of Justice

STATEMENT

OF

**GREGORY G. KATSAS
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE**

**BEFORE THE
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES**

**CONCERNING
IMPLICATIONS OF THE SUPREME COURT'S BOUMEDIENE DECISION
FOR DETAINEES AT GUANTANAMO BAY, CUBA:
ADMINISTRATION PERSPECTIVES**

**PRESENTED ON
JULY 31, 2008**

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Thank you, Chairman Skelton, Ranking Member Hunter, and Members of the Committee. I appreciate the opportunity to appear again before the Committee and to discuss the implications of the Supreme Court's decision in *Boumediene v. Bush* for the more than 200 habeas corpus proceedings currently pending in the United States District Court for the District of Columbia.

When I last appeared before the Committee, the Supreme Court had denied certiorari in the *Boumediene* case, and Congress was considering whether and how to extend habeas corpus to the Guantanamo detainees. Since then, the Supreme Court reconsidered that decision, granted certiorari, and ultimately held that the approximately

265 aliens detained at Guantanamo Bay as enemy combatants have a constitutional right to challenge their detention in United States District Court through habeas corpus.

Last week, the Attorney General addressed the implications of the *Boumediene* decision in remarks made before the American Enterprise Institute. The Attorney General emphasized that *Boumediene* raises as many questions as it answers, and he urged Congress to act expeditiously to pass laws to address those questions, for the benefit of our Nation's security and the orderly litigation of the hundreds of Guantanamo habeas cases pending in the federal courts. In my opening remarks, I would like to take this opportunity to discuss the questions left open by *Boumediene* as well as to explain why we believe it imperative that Congress act.

As the Attorney General explained, the *Boumediene* decision is about the *process* of judicial review that must be afforded to those we detain in our ongoing armed conflict with al Qaeda, the Taliban, and associated groups, not about whether we can detain them at all. Under longstanding law-of-war principles, and under the Authorization for the Use of Military Force passed by Congress immediately after the terrorist attacks of September 11, 2001, the United States has every right to detain enemy combatants in order to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. In addition, this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer.

Although our right to detain enemy combatants in this armed conflict is clear, determining what, if any, rights those detainees should be granted to challenge their detention has been more complicated. This is not surprising, because the laws of war

governing detention of enemy combatants were designed with traditional armed conflicts in mind. However, as the President emphasized shortly after the September 11 attacks, the War on Terror is a different sort of war.

Over the past seven years, each of the three branches of our government has addressed the appropriate legal process for detaining combatants in the ongoing armed conflict. In the first few years after the September 11 attacks, the Executive Branch took the view, consistent with the traditional laws of war, that the United States could detain enemy combatants for the duration of hostilities, without judicial review of those detentions, as we had done in World War II and earlier armed conflicts. In its 2004 decisions in the *Hamdi* and *Rasul* cases, the Supreme Court agreed that enemy combatants in the present conflict could be subjected to military detention. At the same time, the Court recognized a role for the courts in reviewing the government's basis for detaining particular individuals as enemy combatants.

Following these developments, Congress and the Executive Branch sought to apply the Court's guidance in establishing a sound and sustainable framework to support military detention. In 2004, the Department of Defense established Combatant Status Review Tribunals ("CSRTs") to review the determination whether each individual alien held at Guantanamo Bay is, in fact, an enemy combatant. Those tribunals were designed to afford detainees more procedural protections than the Geneva Conventions would afford for status determinations in traditional armed conflicts between signatory countries, and more procedural protections than the Supreme Court had said would be constitutionally sufficient to support the detention of an American citizen as an enemy combatant inside the United States.

Then, Congress enacted the Detainee Treatment Act of 2005, and later the Military Commissions Act of 2006. Those statutes established a new system of judicial review of the decisions to hold the Guantanamo detainees as enemy combatants. Under that system, the Guantanamo detainees could not file lawsuits for habeas corpus in the United States district courts. Instead, however, they were authorized to seek review of CSRT decisions classifying the detainees as enemy combatants in the United States Court of Appeals for the District of Columbia Circuit.

The Supreme Court considered the constitutionality of these procedures in *Boumediene v. Bush*, and held by a five-to-four vote both that the Guantanamo detainees have a constitutional right to challenge their detention through habeas corpus, and that the procedures for adjudication before the CSRTs, followed by judicial review through the Detainee Treatment Act, did not provide an adequate substitute for habeas corpus.

In its basic terms, a petition for habeas corpus is a lawsuit brought by someone in custody seeking release on the ground that his detention is unlawful. The most common example of such petitions involves defendants who have been convicted in state court and who argue that the conviction and subsequent detention violate the Constitution or laws of the United States. For at least a century, habeas corpus has usually applied to imprisonment in regular criminal cases and detention by immigration authorities. Congress and the courts have developed an extensive body of law in both statutes and cases to guide habeas proceedings in those settings.

Before the Supreme Court's decision in *Boumediene*, however, no alien enemy combatant detained outside the United States had ever before received a right to habeas corpus constitutionally protected under the Suspension Clause. The majority opinion

itself acknowledged as much, in stating that the Supreme Court had never before “held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Boumediene*, 128 SCt. at 2262. Nonetheless, the Court concluded that the unique nature of this conflict, and the unique features of the naval base at Guantanamo Bay, Cuba (in particular, the degree of control exercised by the United States over the base), were enough to extend the writ to cover the aliens who are detained there as enemy combatants.

Now that the Supreme Court has spoken, the task is to move forward consistent with the principles set forth in the Court’s decision. That responsibility rests with the Legislative and Executive Branches as much as it does with the judiciary. This reality follows from *Boumediene* itself: Although the Supreme Court settled the question of *whether* the Guantanamo detainees have a constitutional right to habeas corpus, the Court did not decide questions relating to *how* those habeas corpus proceedings must be conducted. To the contrary, the Court stressed that “[t]he extent of the showing required of the Government in these cases is a matter to be determined,” *Boumediene*, 128 SCt. at 2271, and that “our opinion does not address the content of the law that governs petitioners’ detention.” *Id.* at 2277. Moreover, the Court expressly invited the political branches to decide “how best to preserve constitutional values while protecting the Nation from terrorism,” and it stressed that, in assessing those difficult tradeoffs, “proper deference must be accorded to the political branches.” *Id.* Those aspects of the *Boumediene* decision are consistent with the settled and more general principle, as the Supreme Court stated in its 1996 decision in *Felker v. Turpin*, 518 U.S. 651 (1996), that

“judgments about the proper scope of the writ are normally for Congress to make.” *Id.* at 664.

In *Boumediene*, the Court specifically recognized that habeas proceedings for the detainees at Guantanamo Bay could raise serious national security issues, and that these issues could require that adjustments to the rules that apply in ordinary habeas proceedings brought by defendants in domestic criminal custody. The Court noted, and with good reason, that certain accommodations might be made “to reduce the burden habeas corpus proceedings will place on the military” and to “protect sources and methods of intelligence gathering.” *Boumediene*, 128 S.Ct. at 2276. In that respect, *Boumediene* was consistent with Justice O’Connor’s controlling 2004 decision in *Hamdi*, which likewise had acknowledged, in determining the Due Process rights of citizens held as enemy combatants, that “enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). In the case of aliens held as enemy combatants at Guantanamo, the *Boumediene* Court did not decide the issue of what adjustments should be made for these unprecedented habeas proceedings; instead, it left those questions open. It is those questions—the questions that *Boumediene* left unanswered—that Attorney General Mukasey addressed in his speech last week.

First, will a federal court be able to order the release of aliens detained as enemy combatants at Guantanamo Bay into the United States? The Supreme Court stated that a federal trial court must be able to order at least the conditional release of a detainee who successfully challenges his detention. But what does it mean to order the release of a foreign national captured abroad and detained at a secure United States military base in

Cuba? For example, what happens if a detainee's home country will not take him back, or if we cannot transfer the detainee to that country because it will not provide the required humanitarian guarantees that the detainee will not be subject to abuse when he gets home? This question is already upon us in pending litigation. In the *Parhat* litigation, a detainee argued to the D.C. Circuit that the CSRT record did not adequately support his detention as an enemy combatant. After reviewing the CSRT record, the D.C. Circuit concluded that the CSRT had failed to make appropriate findings regarding the reliability of the documents it relied upon and that the Court could not determine whether the documents were, on their face, sufficiently reliable to support the CSRT's enemy combatant determination. The Court therefore ordered the Department of Defense either to conduct a prompt new CSRT for Parhat or else to release him. Then, Mr. Parhat sought an order from the habeas court ordering his *immediate* release into the United States, even *before* the further CSRT or habeas proceedings had run their course. Mr. Parhat, I should add, seeks to settle himself in the greater Washington, D.C. area.

Second, how will the courts handle classified information in these unprecedented court proceedings? Much of the information supporting the detention of enemy combatants held at Guantanamo Bay is drawn from highly classified and sensitive intelligence. And we know from bitter experience that terrorists adjust their tactics in response to what they learn about our intelligence-gathering methods. For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies.

Third, what are the procedural rules that will govern these court proceedings? Must each detainee receive a full-dress trial, with live testimony by the detainee here in

Washington? Will a detainee be able to subpoena a soldier to return from combat duty in Afghanistan or Iraq to testify? Should one detainee be allowed to call other detainees as witnesses? Or compel the United States to reveal its intelligence sources in order to establish the admissibility of critical evidence?

One could say that these questions should be left to the courts, to be resolved through litigation. Unless the political branches act, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending. The federal court in the District of Columbia is already working diligently on some of these issues. But with so many cases, there is a serious risk of inconsistent rulings and considerable uncertainty. Without guidance from Congress, different judges—even on the same court—will disagree about how the difficult questions left open by *Boumediene* should be answered. Such disagreement will, in turn, lead to a long period of protracted litigation—with the possibility of different procedures being used in different cases—until, perhaps, the Supreme Court intervenes yet again.

But uncertainty is not the only, or even the main, reason these issues should not be left to the courts alone to resolve. Congress and the Executive Branch are affirmatively charged by our Constitution with protecting national security, are expert in such matters, and are in the best position to weigh the difficult policy choices that are posed by these issues. Judges play an important role in deciding whether a chosen policy is consistent with our laws and the Constitution, but it is our elected leaders who have the responsibility for making policy choices in the first instance. Moreover, it is well within the historic role and competence of Congress and the Executive Branch to attempt to

resolve difficult questions about the procedures that should apply in habeas corpus proceedings.

For these reasons, the Attorney General recently urged Congress and the Executive Branch to work together to resolve the difficult questions left open by the Supreme Court. The Attorney General identified six principles that he believes should guide any such legislation. I would like to recommend them to you today.

First, Congress should make clear that a federal court may not order the Government to bring those detained at Guantanamo into the United States. There are approximately 265 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; indeed, many already have demonstrated their ability and their desire to kill Americans. Although the Constitution may require generally that a habeas court have the authority to order release, no court should be able to order that an alien captured and detained abroad during wartime be admitted and released *into the United States*. Even bringing a detainee into the United States for the limited purpose of participating in his habeas proceeding would require extraordinary efforts to maintain the security of the site. To the extent detainees need to participate personally, technology should enable them to do so by video link from Guantanamo Bay, which is both remote and safe.

Second, in the context of wartime status determinations, habeas proceedings must be conducted in a way that protects classified information and intelligence sources and methods. We need to protect our national security secrets, and we believe we can accomplish that goal in a manner that is fair to both the Government and detainees alike.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of the detainees charged with war crimes (about 20 at present). Two weeks ago we received a favorable court decision rejecting the effort of one detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. The victims of the September 11th terrorist attacks should not have to wait any longer to see those who stand accused face trial.

Fourth, any legislation should acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans—soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures for habeas proceedings. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings "practical."

Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers should not be required to leave the battlefield to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be sufficient. Federal courts have never treated habeas corpus as demanding full-dress trials, even in ordinary criminal cases, and it would be particularly unwise to do so here.

Sixth, because of the significant resource constraints on the Government's ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. One unintended consequence of the Supreme Court's decision in *Boumediene* is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act, and it should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of United States custody.

These are the central principles that the Department believes should govern any legislation in this area. There is a pressing need for such legislation, as these cases are proceeding now. Chief Judge Lamberth of the United States District Court for the District of Columbia expressed support for legislation, but he urged Congress to act quickly, because the habeas cases are moving forward this fall. He said: "Guidance from Congress on these difficult subjects is, of course, always welcome. Because we are on a

fast track, however, such guidance sooner, rather than later, would certainly be most helpful.” The judgment of the political branches can help the courts to adjudicate these cases fairly, uniformly, accurately, and efficiently, while ensuring that we have firm institutions in place that will allow our Nation to continue to prosecute this war with success.

* * *

Again, Mr. Chairman, thank you for the opportunity to appear today to discuss these important issues. I believe it is important that Congress and the Executive Branch cooperate to ensure that these cases proceed in the federal courts in a responsible and efficient manner that is consistent with the interests of national security, while preserving the procedural rights of detainees. We look forward to working with Congress to meet those objectives.



Gregory Katsas
Assistant Attorney General
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Gregory Katsas is the Assistant Attorney General for the Civil Division of the United States Department of Justice. He has served in the Department since June 2001, first as a Deputy Assistant Attorney General, then as the Principal Deputy Associate Attorney General, and then as the Acting Associate Attorney General.

In these various capacities, Mr. Katsas has argued or supervised many of the leading civil appeals involving the federal government since 2001. Mr. Katsas himself has argued approximately 40 appeals, including cases in every United States court of appeals. His cases have included such topics as: habeas corpus at Guantanamo Bay; presidential war powers in Iraq; the state secrets privilege; military recruiting at law schools; closed immigration hearings for suspected terrorists; recess appointment of Article III judges; partial-birth abortion; and assisted suicide.

Before joining the Justice Department, Mr. Katsas was a partner in the Washington office of Jones Day. He graduated from Harvard Law School, where he was an executive editor of the Harvard Law Review, and he served as a law clerk to the late Judge Edward Becker of the United States Court of Appeals for the Third Circuit and to Justice Clarence Thomas of the United States Supreme Court.

**Testimony of
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Chief Defense Counsel
Department of Defense, Office of Military Commissions
House Armed Services Committee
31 July 2008**

INTRODUCTION

Disclaimer: Thank you, Chairman Skelton and Members of the House Armed Services Committee, for inviting me to speak to you today. My testimony is given in my capacity as a private citizen who is currently serving as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of the Department of Defense, the Army, my subordinates or any other entity.

The Military Commission process has been harshly criticized for allowing statements coerced from an accused – including statements obtained by cruel, inhuman or degrading treatment – to be used in evidence against him in some circumstances; for allowing convictions based on hearsay evidence; for granting the prosecutor virtually unlimited discretion to invoke the national security privilege and thereby prevent the defense from learning material facts; and for otherwise denying the accused fundamental rights that are honored in both the military and civilian criminal justice systems. This Subcommittee is familiar with these criticisms and I will not belabor them here. The role of the Office of the Chief Defense Counsel has been to serve as the conscience of the United States government in these proceedings, by insisting, in the face of the prosecution's claim that the Constitution is irrelevant in Guantanamo Bay, that the Commissions abide by the fundamental law of the land applicable in every other American judicial proceeding where life and liberty are at stake. In that connection, the attorneys in my office have challenged the legality of the rights-denying provisions of the MCA both before and after *Boumediene* was decided. Our daunting task, in the presence of national fear and a sensed fear of the Rule of Law, is instead, to defend the Rule of Law and to insist that it has application to those being held at GTMO who are being charged. I will not go into the technical details of their arguments and motions, many of which have yet to be filed. Instead, I will provide an overview of *Boumediene*'s potential impact on the Commission proceedings more generally, focusing on sections of the Supreme Court's majority opinion that are particularly relevant. I will not address how our office resources will be most likely affected by the decision or how our office continues to struggle to maintain its independence and zealously represent those accused as is our duty. I will, obviously, entertain any questions that you have to the extent I can.

I have been asked to testify today about what the implications of the Supreme Court's decision in *Boumediene v. Bush* are likely to be for the detainees at Guantanamo Bay, Cuba. I have served as the Chief Defense Counsel of the Office of Military Commissions since August of 2007 and, in that time, have seen the number of cases expand from two to twenty-one. I have served in the United States Army for over 26 years in a myriad of assignments, both on Active Duty and as a member of the Reserve Component Services. While I am currently serving as Chief Defense

Counsel, I am on leave from my civilian profession as an elected Circuit Court Trial Judge in my home State of Indiana. I have served over thirteen years as a Trial Judge in Indiana. I consider myself a public servant. I have also served as a Military Judge, both in the Army Reserves and on Active Duty in the Army. I am proud to be an elected office holder and I am proud to wear the uniform of the United States Military. In my office in Boone County Indiana, I proudly and with great reverence, display the "Flag on Honor" with the names of the 9-11 victims. I do not see my role as an elected Judge or my obligations as an officer in the United States Military as any way inconsistent with my obligations as the Chief Defense Counsel. Because of the unique vantage point I have, I will generally confine what I have to say to what *Boumediene* means for the military commissions.

That said, and to put it briefly, the most important thing that *Boumediene* held is something that I always thought was obvious. Like Thomas Paine said in *Common Sense*, "In America the law is King. For as in absolute governments the king is the law, so in free countries the law ought to be king, and there ought to be no other." *Boumediene* held that in America, there are no law free zones.

The Status of GTMO

Why this was even an issue is because of the choice in 2002 to move enemy combatants from Afghanistan and terrorism suspects captured around the world to the U.S. military base at Guantanamo Bay, Cuba. As Defense Secretary Rumsfeld said at the time, this was the "least worst place" to put them. What made GTMO the "least worst place" was the fact that its legal status was ambiguous. On the one hand, it is technically Cuban territory. On the other, and for all practical purposes, it has been ours ever since we took it over from the Spanish in 1898, along with Puerto Rico, Guam, the Mariana Islands and all of the other, so called, "unincorporated territories."

The result was that even though the government could, and did, treat it as if it was U.S. soil, it took the position that it was foreign soil when it came to the rights of the people we held there. In support of that view, the government relied upon two Supreme Court cases – *Johnson v. Eisentrager* and *United States v. Verdugo-Urquidez*. *Eisentrager* dealt with German prisoners who had been tried by military commission and held in a military prison in occupied Germany after WWII. *Verdugo* dealt with a warrantless search conducted by U.S. law enforcement in Mexico. In both of these cases, the Supreme Court held that what U.S. officials did in a foreign country implicated the relations between the United States and that foreign government. Accordingly, the U.S. Constitution did not supplant that countries' local law unless the individuals involved had some other significant connection to the United States, such as citizenship or property they owned in the U.S. that would warrant it.

I raise these cases not to make an oral argument, but to give context to what *Boumediene* decided. Because unlike Germany and Mexico, there is no local law in GTMO. I don't have to tell you that U.S. relations with Cuba have not been the friendliest over the past fifty years and the ring of landmines around GTMO is one of many steps that are taken to ensure that Cuban law

does not apply there. There is no conflict between the Constitution and foreign law at GTMO. There is the choice between the Constitution and no law at all.

In *Boumediene*, the Court said “Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”

Federal Court Habeas Corpus Review of Military Commission Procedures and Verdicts

Boumediene holds that a detainee found to be an “unlawful enemy combatant” in a CSRT hearing may challenge that finding on federal habeas review. This holding by itself may have consequences for Military Commission proceedings, because a finding that the accused is an “unlawful enemy combatant” is a prerequisite of the Commission’s personal jurisdiction. In other words, under the MCA, unless the accused is an “unlawful enemy combatant,” he may not be tried before a Military Commission. Thus, a detainee’s habeas challenge to his CSRT determination is in effect also a challenge to the government’s right to try him before a Commission. In *Hamdan v. Gates*, the first federal habeas case to be litigated after *Boumediene*, Judge James Robertson found it unnecessary to address Mr. Hamdan’s challenge to his “unlawful enemy combatant” determination, because he thought that on the particular facts of Mr. Hamdan’s claim habeas review should wait until after the Commission proceedings were completed. It remains to be seen, however, whether habeas petitions by other Commission defendants presenting different sets of facts will be held to warrant pre-trial intervention on the question of personal jurisdiction.

Beyond CSRT determinations, the majority opinion in *Boumediene* has clear implications for the availability of habeas corpus review of Military Commission procedures and verdicts as well. *Boumediene* declared section 7 of the MCA, which purported to strip federal courts of habeas jurisdiction over the CSRT determinations, to be unconstitutional. Another section of the MCA, now codified at 10 U.S.C. § 950j(b), also purports to strip federal courts of habeas corpus jurisdiction over the Military Commission verdicts and procedures. *Boumediene*’s reasoning strongly suggests that § 950j(b) is also unconstitutional and that there will be federal habeas corpus review of Military Commission verdicts and procedures.

First, the Supreme Court noted that habeas review is constitutionally required even where the prisoner has been “detained pursuant to the most rigorous proceedings imaginable,” that is, “a criminal trial conducted in full accordance with the protections of the Bill of Rights.” It necessarily follows, then, that habeas must also be available after the Commission process runs its course, since these are criminal trials conducted on the explicit assumption that the Bill of Rights has no application whatsoever (at least, that is the position that the government has taken in these cases, and to date the Commission judges have agreed).

The only remaining question under *Boumediene*, once a general right to constitutional habeas corpus is established, is whether the procedures afforded the defendant under the challenged statutory scheme provide an “adequate substitute” for habeas review. Again, the *Boumediene*

opinion, which addressed this question in the context of CSRT procedures, provides good reason to believe that the MCA procedures will fail constitutional muster on this ground as well. In finding that the D.C. Circuit Court of Appeals review provided by the Detainee Treatment Act of 2005 (DTA) was not an “adequate substitute,” the *Boumediene* Court focused on a number of flaws in the DTA process, but ultimately held that there was at least one flaw that was dispositive of the DTA’s “inadequacy” as a habeas substitute: the reviewing court’s lack of authority to consider exculpatory evidence discovered after the CSRT proceedings concluded.

Do Fundamental Due Process Rights Apply in Guantanamo?

The *Boumediene* majority decided that the Suspension Clause applies extraterritorially, at least insofar as it reaches to Guantanamo Bay. What the Court did not decide, however, to the consternation of some, is what other constitutional rights apply in Guantanamo. That issue is critical, because the question that federal habeas courts will ultimately have to decide is whether the Military Commission procedures comport with the Constitution. The content of the rights that apply at Guantanamo will provide the measure for that determination.

Although the Court did not provide an express answer to the question of what other rights apply, in the course of discussing the Suspension Clause it clarified the analytical framework required to answer it. In doing so, it left little doubt that the basic constitutional guarantees of fairness, including the bar on receiving coerced statements in evidence, the right to confront witnesses, and other fundamental due process rights, are enforceable in Guantanamo.

Prior to *Boumediene*, the Court had long recognized that certain fundamental rights protect noncitizens even outside the sovereign territory of the United States. In analyzing whether the Suspension Clause was among these rights, Justice Kennedy concluded for the majority that the extraterritorial effect of a particular constitutional provision turns on “objective factors and practical concerns, [and] not formalism.” Consistent with this practical view, the majority rejected the notions that extraterritorial application was strictly a function of the United States’s territorial sovereignty or of a habeas petitioner’s citizenship, and instead adopted Justice Harlan’s focus on the practical obstacles to honoring the right: “the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”

The Supreme Court thus adopted a pragmatic analysis that looks primarily to whether particular constitutional rights can be honored on the foreign territory without undue burden on the United States government or displacement of the local forms of justice. Along the way, the Court endorsed certain principles that are highly relevant to the question of whether other constitutional protections apply in Guantanamo.

First, it is clear that neither *de jure* sovereignty over the location of the proceeding nor the citizenship of the defendant is dispositive of the extraterritorial application question. After *Boumediene*, that the accused is an alien and that the trial is held off-shore does not answer the question of whether the United States must abide by the Constitution before taking life or liberty.

Second, the Supreme Court concluded that Guantanamo Bay was *de facto* within the territory of the United States for purposes of the extraterritoriality analysis, stating that “[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.” That conclusion was based on the pragmatic realities of the United State’s control over Guantanamo and not on any special characteristic of the habeas corpus right. Thus, absent some special factor, the applicability of other fundamental rights in the Commission proceedings will be determined no differently than if they were occurring on the United States’s sovereign territory.

Finally, the *Boumediene* majority noted with regard to the Suspension Clause that applying it at Guantanamo placed a burden on the government, insofar as it would require new and further proceedings that would cost money and “divert the attention of military personnel from other pressing tasks.” Despite these concerns, the Court held that they were not dispositive: “The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”

By contrast, recognition of other fundamental rights of due process will not place any such burdens on the government at all. Unlike the Suspension Clause right, honoring other constitutional rights will not initiate new judicial proceedings in courtrooms far away from Guantanamo Bay, but will simply guarantee the fundamental fairness of the commission procedure that is *already* part of the military mission at Guantanamo. There are no “credible arguments” that an accused’s rights under the *Ex Post Facto* Clause, or his Due Process Clause right not to have coerced testimony used against him in court, or his Sixth Amendments rights to confront the witnesses against him, to the effective assistance of counsel, and to a speedy and public trial, for example, will place any burden on the government other than the burden of providing guarantees of fair treatment in the procedures already initiated against him. Nor do the government’s legitimate concerns for secrecy and national security permit the wholesale rejection of an accused’s fair trial rights. These concerns are dealt with every day in domestic civilian courts and military courts-martial in a manner that preserves both the government’s interests and the defendant’s constitutional rights.

There is little doubt that judicial rulings applying these due process rights to the Guantanamo trials would profoundly alter their nature, since so many of the MCA procedures were designed with the conscious intention of denying or ignoring these rights. These are defendants who have been held incommunicado for years without being allowed to consult with an attorney. They have been subjected to interrogations which at their most lawful were conducted outside the presence of counsel and without warnings that the defendants’ statements would be used to convict them in court, and which at their worst amounted to torture or cruel, inhumane, and degrading treatment that is criminalized under federal law and banned by international treaties to which the United States is a signatory. These are facts that would threaten the very possibility of prosecution in ordinary criminal courts where the Constitution is held to apply.

Moreover, many of these are capital cases (including the so-called “high value detainee” conspiracy case against the individuals charged with the 9/11 crimes), to which the Supreme Court has applied a heightened standard of constitutional scrutiny. To mention just one issue of special relevance to capital cases that has received less attention than some others, the Supreme Court has become much more vigilant about the constitutionally required effectiveness of

counsel in death penalty cases. Yet conditions at Guantanamo, in terms of access to clients, inadequate resources and facilities, and obstacles created by the classification of so much of the evidence, have created a situation in which constitutionally effective assistance of counsel is a daily struggle. That is no criticism of the defense attorneys working on these cases, who have done an astonishing job of carrying out their missions under the most difficult of circumstances. It is simply to say that even to begin to apply the Constitution to these trials, as *Boumediene* ion.

To date no federal judge has yet passed on the question of which constitutional rights apply at Guantanamo after *Boumediene*. Judge Robertson in the *Hamdan* decision abstained on prudential grounds from deciding that question, but he noted in passing the MCA's "startling" departure from the norms of United States civilian court and court-martial procedure insofar as it allows coerced statements into evidence. "Startling," here, is presumably a euphemism for "shocks the conscience" – the constitutional standard under which interrogation methods far less gruesome than those applied to many of the Guantanamo detainees have traditionally been condemned and their fruits excluded from evidence in federal and state criminal trials. Despite the absence of definitive court rulings, for the reasons stated today there is good reason to think that other federal judges will find the MCA's departure from American constitutional norms traditions "startling" as well, and after these trials are concluded, will not be constrained in substantive rulings that use the stronger language of constitutional condemnation.

Despite *Boumediene*'s message that the Constitution applies at Guantanamo and that federal courts will eventually review these proceedings on habeas corpus, that fact has not yet made an impression in the Commission proceedings themselves. It does not bode well for that future habeas review, for example, that shortly after *Boumediene* was decided, and virtually contemporaneously with Judge Robertson's "startling" comment, the military judge in the first Commission case to go to trial ruled that the Due Process Clause does not apply in the Commissions and that some coerced statements would be admitted at trial.

THE FUTURE OF THE MILITARY COMMISSIONS

As I said, I would have thought this was obvious to everyone until coming to serve in my current role. We are a nation first and foremost of laws. This is why the men and women of our military must take an oath to "support and defend the Constitution against all enemies, foreign and domestic."

A number of the witnesses most likely have or will discuss the many deviations the military commission allows from the procedures that would govern commissions convened under the UCMJ or in federal courts. The admission of forced confessions into evidence, limitations on the right to counsel and access to evidence, and the prosecution of at least two juvenile offenders without any account being taken of their age, names but a few.

The situation created by *Boumediene* is that the military judges confronted with these problems are put between the rock of applying the Constitution and the hard place of the government's reading of the Military Commissions Act. In litigating these issues, the government still maintains that the Constitution does not apply at all. They have taken the position that

Boumediene only applied the Constitution's Suspension Clause to GTMO and no other; not the Bill of Rights nor even the Ex Post Facto Clause. No fair reading of *Boumediene* supports such a narrow view, but that is the position they have forced themselves into, since many of the provisions of the Military Commissions Act and the Rules for Military Commissions are not "battle tested," and in many instances, are squarely at odds with controlling precedent on what due process requires.

Exacerbating the difficulty of resolving these very novel and complex legal questions is the highly politicized atmosphere surrounding everything the commissions do. Some of it is inevitable given the intense international interest in everything that goes on in GTMO, but some of it is self-inflicted. The military judge in the Hamdan case, for example, found that the legal advisor to the Convening Authority had systematically overstepped his role to such an extent that it amounted to unlawful influence of the Office of the Chief Prosecutor. Much of this appeared motivated by a desire to accelerate as many of these cases to completion before the presidential election as possible. This has come, in my judgment, at the cost of fairness, and perceived fairness, and in the face of logistical difficulties that have plagued every case at every step along the way. While there is always an imperative to ensure speedy trials, the pace of these trials, which are some of the most complex criminal trials ever brought, should be dictated by the facts of the case, not a political timetable. If this process cannot survive a presidential election, it doesn't deserve to survive.

Which brings me to the question of whether, after *Boumediene*, these commissions will and should survive at all. To the extent these commissions were intended to be convened beyond the reach of the Constitution, *Boumediene* makes clear that GTMO is well within the Constitution's grasp. At the edges, there will be some debate about the extent to which provisions of the Constitution apply extraterritorially, but there is a hundred years of precedent from the Supreme Court on this subject, and in the end, there is little doubt that the significance of GTMO's territorial status will not be very different than Puerto Rico's. Then there is the question of the application of the Constitution to military proceedings, and there is a hundred years of precedent on that as well. I can assure you that the military trials I have presided over as a military judge do not look that different from the trials I have presided over in Indiana.

So the question of whether the military commissions will survive at all appears to be in doubt and, if they do, those provisions of the Military Commissions Act that survive constitutional scrutiny will ultimately make the commissions look a lot like they would have looked had they been convened under the UCMJ. As I have been saying since I took this position, and many many others before me... is that we can do better than the Military Commissions Act. Our nation's legal integrity is on trial at the same time the Hamdan case is proceeding and we are not faring very well.

Which leads me to believe that the question of whether they *should* survive is in even greater doubt. Even assuming some of the military commissions reach completion, as the case of Salim Hamdan appears it will by the end perhaps even by the end of this week, any conviction is almost guaranteed to be reversed by the appellate courts. This process could take a matter of years and by the time that happens, some of these detainees will have been held for more than eight years, making any retrial enormously complicated by the passage of time, if not impossible. You must ask yourself then, why are we pressing forward with something that many, a majority

agrees is doomed to fail? Why proceed at such great cost financially and to the international reputation of the United States as a stalwart guardian of human rights and the due process of law? Why are such things as Torture even being discussed, let alone its definition being debated in 2008 AD? Maybe 2008 BC but not today. Why are we in Cuba in 2008? Doesn't the fact that we are conducting "trials" in Cuba make your skin crawl? We are the United States of America! Why are we hiding in Cuba?

ALTERNATIVE WAYS FORWARD

This question becomes even more poignant in the face of the alternatives that are readily available to try these cases.

Some have proposed a national security court that will fix some of the more significant problems with the military commissions, but nevertheless provide an alternative forum for these kinds of terrorism cases. My first instinct is to say that such a court will be no less fraught with logistical and legal difficulties than are the current military commissions. You can expect the first five to ten years of the court's operations to be weighed down with challenges to its legitimacy. I would venture to guess that nearly every deviation in the procedures of such a court will reach the Supreme Court in one form or another. This is how it should be, since this is the standard of zealous advocacy that makes our criminal justice system so robust.

The overriding consideration that I would put to you, however, is that none of the defendant's I have seen so far charged are worthy of such a venture, nor of this one. Some of the defendants may no doubt be evil people and may be guilty of some of the worst acts of terrorism in our country's history. They are not, however, too great for the U.S. justice system and treating them as such turns them into international celebrities to an extent far in excess of their individual merit. To put it in perspective, Timothy McVeigh was tried, convicted and executed within six years of his bombing the Oklahoma City Building. It has now been almost seven years since the attacks of September 11, 2001.

The real alternative is to demonstrate to the world and our enemies that our Constitution is not a handicap in the war on terrorism, but the source of our greatest strength. Court-martials historically and federal courts recently have had no difficulty in prosecuting terrorists no matter where in the world they are captured. Indeed, some of the alleged co-conspirators of detainees currently being tried at GTMO have already been prosecuted and convicted in our federal courts. Perhaps one of the most dangerous men in the world, the international arms dealer Viktor Bout, was arrested this past winter in Singapore and is now standing trial in the Southern District of New York for providing military weaponry to terrorist organizations, including al Qaeda.

There are no doubt difficulties to trying such cases in regular civilian or even military courts. The major concern that is both substantial and legitimate is the need to protect national security information, much of it classified at the highest levels. This information will often be necessary to the proper prosecution and defense of a terrorism suspect and the risks of having that information leaked to the public may be as high as declining to prosecute may be unacceptable. One solution therefore may be bolstering the Classified Information Protection Act.

Another, and this is based of my experience with the fine men and women who have served in the Office of the Chief Defense Counsel, would be to establish some form of National Security Defense Counsel's Office. This office could be required to participate in any national security prosecution and could be staffed with military and civilian personnel with the highest levels of security clearance, whose professional careers and place within the government would ensure that the most sensitive government information stays in the hands of the government. As I am leaving active duty in the next few months to return to the bench in Indiana, I can assure you that I am not seeking a job. This is merely meant as a suggestion for balancing the legitimate need to protect national security information with the need to afford trials that will not make martyrs of the defendants, but show those convicted to be the criminals they are.

CONCLUSION

I will conclude by reiterating the point with which I opened my remarks. *Boumediene* reaffirmed what should be a surprise to no American –that where our government is sovereign, the Constitution is sovereign. This fact will lead to the ultimate striking down of the most constitutionally suspect of the military commission procedures now in place. The only question that remains is how long it will take, how many convictions must be reversed and whether it will be the product of the rulings of the military judges presiding over the commissions or the appellate courts on review. The same uncertainty cannot be said exist with the trials of Viktor Bout, Timothy McVeigh, Zacarius Moussaoui or Ramzi Yousef. Since it is now simply a question of when, the only remaining one is why? Since there are alternatives in place both within the military and civilian justice systems, that's a question I don't have an answer to.

The ultimate tragedy is that United States federal courts and military courts-martial have shown themselves to be more than capable of meting out justice to terrorists under the traditional principles of American justice that the Military Commissions system has abandoned. Even before *Boumediene*, the Military Commissions were a stain on the United States justice system's reputation. *Boumediene* now makes it clear that they will almost certainly be futile exercises.

As one of my favorite country music singers, Toby Keith explains in one of his songs, "There ain't no right way to do the wrong thing."

Thank you for the opportunity to express my opinions. If you have any questions, I will try to address them at this time.

Colonel Steven David

**Chief Defense Counsel
Office of Military Commissions, Office of the Secretary of Defense**

COL David is the Chief Defense Counsel for the Office of Military Commissions in the Office of the Secretary of Defense. He has served in that capacity since September of 2007. As Chief Defense Counsel, COL David is responsible for the overall defense of detainees at Guantanamo Bay (GTMO) who are charged under the Military Commissions Act. His office is composed of officers and non-commissioned officers from the Army, Navy, Marines and Air Force. He also supervises civilian attorneys, civilian support staff, and contractors.

COL David is an Army Reservist and is on his second mobilization tour. He has served on Active Duty and in the Active Reserves for over 26 years. He has served in a variety of capacities, including as a Trial Defense Counsel on Active Duty, as a Legal Support Organization Commander, and as a Military Judge, both in the Reserves and on Active Duty.

In his civilian role, COL David is the Circuit Court Judge in Boone County, Indiana. He was elected in 1994, 2000, and 2006. He has criminal, civil, family, and juvenile jurisdiction.

COL David holds a Juris Doctorate from Indiana University and a Bachelors of Science in Finance from Murray State University. He was a ROTC Scholarship Student and a Distinguished Military Graduate.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 31, 2008

**Supplemental Testimony of
Steven David
Colonel, United States Army Reserve
Chief Defense Counsel
Department of Defense, Office of Military Commissions
House Armed Services Committee
Supplementing the Testimony Submitted
31 July 2008**

My testimony is given in my capacity as a private citizen who is currently serving as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of the Department of Defense, the Army, my subordinates or any other entity.

INTRODUCTION

I thank Chairman Skelton and the Members of the House Armed Services Committee for allowing me to supplement my testimony provided on 31 July 2008. I will address these additional remarks to three questions asked by Subcommittee Member Hunter: the rights provided to the accused by the Military Commissions Act; instances of mistreatment, misconduct or abuse of detainees at Guantanamo Bay; and recommendations for improving the Military Commission process. As with my original testimony, because of my role as Chief Defense Counsel my focus here is on the military commission process and detainees who have been charged under that process and not with detainees more generally.

RIGHTS THAT THE ACCUSED DO NOT HAVE UNDER THE MILITARY COMMISSION ACT

Congressman Hunter directed my attention to fifteen rights provided to the accused under the Military Commissions Act (MCA). I address those below, but it is critical for the Subcommittee to understand two fundamental constitutional rights that are *not* provided by the MCA – indeed, that are expressly and deliberately abrogated by its terms. There are other constitutional rights that the MCA does not provide for – most obviously, the right to trial by jury – but I have focused this supplemental testimony on the two rights whose absence is a leading cause of the commission proceedings’ unfairness and unreliability.

The Right Against Using Coerced Statements

The first is the right not to have testimony that has been coerced from the accused introduced against him at trial. The Supreme Court has held for over 70 years that where a criminal defendant’s pretrial statements were “involuntary” – that is, where they were coerced from him by the state – then the use of those statements to convict him is “so offensive to a civilized system of justice that they must be condemned under the Due Process Clause.” The use of coerced statements is offensive for two reasons: First, the use of coercion to overbear the will of a suspect is, by itself, inconsistent with the norms of a civilized system of justice. Second, and

equally important, where the fruits of that coercion are used in court against the defendant, all of the other rights that go into making our system of adversary justice the fairest in the world are rendered virtually meaningless. When the prosecution has the defendant's confession in its pocket, for example, proof beyond a reasonable doubt is an easy standard to meet. Similarly, the defendant's right to a counsel at the trial comes much too late if the defendant has been coerced into a confession that can be used against him over that counsel's objections.

The rule against the introduction of involuntary confessions is so fundamental that it was among the very first elements of due process that the Supreme Court enforced against the states. The prohibition bars mental as well as physical coercion. And while the reliability of any coerced statement is always open to doubt – indeed, that was the original reason for banning such statements at common law, prior to the adoption of the Constitution – the Due Process ban on their use does not depend on whether the statements were reliable, corroborated, or even true. It is the fact that the governments conduct “shocked the conscience” that offends the Constitution.

That is the constitutional rule. What does the MCA have to say on the subject of the prosecution's use of an accused's coerced statements? It says that statements obtained by the use of “torture” are excluded. Thus, if the military judge finds that the interrogation technique amounted to “torture,” it will not be admitted in evidence. But since the definition of “torture” under the MCA rules is extremely narrow – it is limited to the intentional infliction of “severe physical pain” or “prolonged mental harm” caused by threats of imminent death or the administration of personality-altering drugs – there is no guarantee, regardless of how coercive or shocking an interrogation technique, that it will fall within that definition. By way of example, the United States government has consistently maintained that it has not employed “torture” against any detainee, even while admitting that Khalid Sheikh Mohammed was water boarded on over 100 occasions. A military judge who accepted this characterization could thus find that he was not obligated to automatically exclude statements obtained through water boarding.

All other interrogation techniques, short of that restricted definition of torture, fall within another rule that expressly permits the use of coerced testimony. If the prosecution disputes the “degree of coercion” used against the accused – in other words, claims that the interrogation did not amount to torture – then, for statements made prior to December 30, 2005 (the effective date of the Detainee Treatment Act), the statement will be admitted if the military judge finds, by a preponderance of the evidence, that the statements are “reliable,” that they are sufficiently probative, and that admission “best serves the interests of justice.” “Reliability” is not defined in the statute or rules. Even before the Bill of Rights was adopted, however, coerced statements were excluded from evidence in criminal cases on the ground that they are inherently unreliable. How the admission of such statements can ever serve the “interests of justice” is a mystery.

Since most of the CIA's and other government agencies' controversial intelligence-gathering techniques were employed before the DTA was passed, that is the provision that will have the greatest impact on the admissibility of the “disputed” coerced statements. For statements made after December 30, 2005, the statements will be admitted so long as the military

judge makes the same reliability and probativeness findings as for the earlier statements, while also finding that the statements were not the product of “cruel, inhuman, or degrading treatment.”

Taken literally, this set of rules means that if an accused claims that a statement taken prior to December 30, 2005 was obtained by torture (for example, by water boarding), the government could admit that the defendant was water boarded but dispute its characterization as “torture” (as it has consistently done up to now). The military judge could agree with the government characterization (finding, in other words, that regardless of its coercive effect, water-boarding is not “torture” within the meaning of the MCA) and then proceed to find that the statement – although coerced – was nevertheless reliable, probative and justly admitted in evidence. That result is utterly inconceivable in any court in which the Due Process Clause is honored. Yet the MCA was evidently written with precisely that outcome in mind. The Military Commissions Judges are the best of the best and they are sworn to uphold and defend the Constitution of the United States of America. The MCA places significant pressure on them to enforce a system which is not consistent with anything they have been taught and anything that they are obligated to serve as stewards of. As a State Trial Court for 14 years in Indiana and as a former Military Judge, it is my opinion that we can do better than this. What are we doing in the Courtrooms of Cuba in 2008?

The recently concluded *Hamdan* trial provides telling examples of the absence of Due Process protections. There the military judge admitted statements obtained from Mr. Hamdan while he was shackled and hooded in Bagram prison, and other statements obtained during a period when, by the government’s own admission, it was subjecting him to a deliberate program of sleep deprivation in order to get him to cooperate. Compare those decisions with the many early Supreme Court cases in which, because “the degree of coercion” was “disputed” (the defendant claimed that he had been beaten or threatened while the government insisted that he had been treated humanely and politely), the Court instead found that the undisputed fact that the defendant had been deprived of sleep during his interrogation was enough to prove that the resulting statements were involuntary. The government has admitted the use of sleep-deprivation techniques against other detainees as well. I think it is safe to say that no federal district court or court-martial in the country would admit statements obtained under these circumstances.

Finally, in *Miranda v. Arizona* the Supreme Court mandated that in order to help dispel the inherent coerciveness of all custodial interrogations – regardless of the particular interrogation techniques involved – criminal suspects must be warned that any statements they make can and will be used against them in court and that they have a right to the presence of an attorney, who will be provided at government expense if they cannot afford one. If ever there were custodial interrogations that were “inherently coercive,” it is the interrogations that have been carried out at Guantanamo – interrogations in which (even leaving aside any other coercive techniques that might have been applied to them) the detainees’ only hope for eventual release turned on the good graces of their interrogators. Nevertheless, Guantanamo detainees have not been read their *Miranda* rights in connection with their interrogations, and in particular are never told that they have the right to the presence of an attorney.

In one of its early cases on involuntary confessions, the Supreme Court included these reassuring words about the Due Process protection:

There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.¹

Unfortunately, that is the kind of government that the MCA has established at Guantanamo Bay.

The Right to Confront the Prosecution's Witnesses

The Sixth Amendment guarantees to every criminal defendant the right "to be confronted with the witnesses against him." Justice Scalia has described the Confrontation Clause as a "bedrock procedural guarantee" that distinguishes our adversarial system of justice from inquisitorial systems of justice, like those employed in Europe. The American legal tradition has made live testimony and cross-examination the touchstones of the reliability of its criminal trials. Indeed, the Supreme Court has called cross-examination "the greatest legal engine ever invented for the discovery of truth."

The MCA expressly abrogates this "bedrock guarantee." Rather than require the government to produce its witnesses for cross-examination, it makes hearsay presumptively admissible unless the opposing party affirmatively demonstrates that the proffered hearsay is unreliable or lacks probative value. Given the coerced nature of so much of the testimonial evidence obtained from detainees, some of which the government almost certainly intends to introduce in military commission trials as evidence against others, that reversal of Confrontation Clause values is particularly likely to impact on the reliability of commission verdicts, apart from its impact on the accused's rights.

RIGHTS OF THE ACCUSED UNDER THE MILITARY COMMISSION ACT

Congressman Hunter inquired about a list of fifteen rights that he had mentioned in the previous day's testimony. I have reviewed this list and provide brief comments below. My point is simple. It is not the right on paper that protects the accused and the fairness of the system, but the right that is honored on the ground. The commission proceedings have been woefully and systematically deficient in the latter respect.

¹ *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

The Right to Counsel

This is without doubt a critical right, one that the Supreme Court has described as a key to the meaningfulness of all of the criminal defendant's other rights. But a right to counsel in name only is not a right to counsel in the constitutional sense (a point that the Supreme Court first made in the *Scottsboro boys* case in 1932). Unfortunately, numerous conditions, all of them put in place by the MCA or the security apparatus at GTMO, have made the practical realization of this right exceedingly difficult.

An effective attorney-client relationship requires trust. The MCA mandates that the accused be represented by an American military officer, and that civilians who represent them be American citizens as well. That is by itself an enormous obstacle to overcome, since many of the clients either have been, or felt themselves to have been, abused by Americans, and are deeply suspicious of any American claiming to have their best interest at heart. That problem has been compounded by the extraordinarily short periods of time that defense attorneys have had to try to overcome these obstacles, since attorneys are only detailed once charges are filed and referred. By then, it is frequently too late since the clients have spent years in conditions of confinement at Guantanamo and elsewhere that have understandably made them suspicious of any American offering to help – especially Americans who ask them questions, as every defense lawyer is bound to do.

These difficulties have been exacerbated by the logistical obstacles that the Guantanamo security apparatus and location have imposed on the attorney-client relationships. Some of these obstacles are a function of the remote location of the Guantanamo prison and limited flights available, which means, at the best of times, that the defense attorneys are able to spend only a fraction of the time that other lawyers would be spending with their clients in similar circumstances. Others are the product of bureaucratic bumbling and/or indifference on the part of the government agencies that almost appears calculated in its interference with the attorney-client bond. To cite an example, one of the attorneys in my office – a Navy Lieutenant Commander -- attempted to obtain a meeting with his client three times prior to the client's arraignment, and was refused each time on the ground either that he had could not be "read on" to the security program in GTMO (he was told to return to Washington, get read on there, and then come back) or that no meeting room was available. He was finally allowed to meet with his client for three hours on the day before the arraignment.

Another common problem is the resistance of the Guantanamo Joint Task Force (JTF) personnel to the habeas corpus attorneys who began representing detainees long before the MCA was enacted. It is sometimes helpful for detailed military counsel to meet jointly with their new client and with that client's habeas counsel, since the client has already established a trust relationship with the habeas counsel. In the past, such joint meetings have been prevented by JTF. In another instance, detailed counsel sought to interview another detainee (not his client) as a possible witness. The detainee was represented by habeas counsel. JTF permitted the interview, but the Convening Authority refused to allow habeas counsel to be present. Since it would be unethical for detailed counsel to interview the witness outside the presence of his counsel, the interview never took place.

Most noteworthy is the fact that the Right to Counsel does not even attach until the Government says it does, i.e., the preferral of charges. This can take place and is taking place after years of detention and after countless interrogations. The Right to counsel comes so late in the process that it is rendered almost moot.

The above list of issues is not exhaustive. Every prison environment imposes a strain on an attorney's ability to represent his client, but the obstacles that Guantanamo puts in the way of a productive relationship are extraordinary. There is good news, not substantively but instead due to the efforts of the JTF-GTMO SJA's office and the Office of the Chief Defense Counsel. Many access issues have been resolved and through patience and cooperation and a willingness to talk through issues, we have made substantial process in getting access to the accused at GTMO. Again, this has not been due to the MCA, but the efforts of the lawyers to work together.

The Presumption of Innocence and Proof Beyond a Reasonable Doubt

These are certainly important rights (although, as the Supreme Court has made clear, they are actually two sides of the same right). But for the reasons that I described above, they are virtually meaningless if the government can introduce coerced, uncounseled confessions and hearsay statements that the defendant has no right to test by cross-examination. While the commissions would undoubtedly be less fair if the required burden of proof were lower, under the circumstances the existence of these rights hardly makes the commissions a fair process.

The Opportunity to Obtain Witnesses and Other Evidence

The commission rules provide the accused with a "reasonable opportunity" to obtain witnesses and other evidence. Again, that is an important right in the abstract, although it is difficult to conceive of any legitimate system of justice that would deny this right to an accused. In any event, this right is rendered far less meaningful by the realities of the commission cases, virtually all of which will require defense evidence and testimony from foreign witnesses who are beyond the reach of the subpoena power, or evidence that is classified and therefore, under the MCA, unavailable for use in its original form.

Right to Discovery and Exculpatory Evidence Provided to the Accused

The right to obtain information held by the government that is material to the accused's case, especially if it tends to exculpate the accused, is critical to the fairness of any trial. How reliably the government complies with its discovery obligations, however, is the key to the meaningfulness of these rights, since the government is in sole control, and generally with sole knowledge, of the evidence in its possession. The prosecution's record to date with respect to these obligations is abysmal. Key documents produced for the very first time on the eve of trial (in *Hamdan*, over 600 such documents), massive dumps of tens of thousands of documents produced in the most difficult-to-work-with formats without any index, and similar strategies have characterized the discovery process in all of the cases. Nor is our confidence that these rights will be honored helped by the fact that two commission prosecutors who resigned a few

years ago alleged, among other ethical and legal violations, that exculpatory evidence was being destroyed or suppressed.

The Exclusion of Statements Obtained by Torture

I have addressed this “right” above. Suffice it to say that this is not something that Congress should be advertising as any guarantee of the fairness of the commissions.

Classified Evidence must Be Declassified, Redacted or Summarized
To the Maximum Extent Possible

This is a noble sentiment, but the reality has been otherwise. One example of the over-classification of evidence will have to suffice here. At the behest of the government, every single word uttered by any of the high-value detainees is presumed to be classified Top Secret. Since these are individuals who have been subjected to cruel, inhumane or degrading treatment (and/or torture, depending on one’s definition) for years, among the first duties of any defense attorney is to have the client evaluated for competence. Because of the classification rules, only mental health professionals with Top Secret clearance can have access to the high-value detainees – and there aren’t a lot of those around. For the same reason, every other expert or specialist who needs to consult with the HVD accused must have similar clearance. This puts an enormous obstacle in the path of the defense. The government’s approach to classification in other areas (discovery, defense trial testimony, and so on) has similarly taken the “classify first and ask questions later” approach.

Statements Allegedly Obtained Through Coercion Are Only
Admissible If the Military Judge Rules That the Statement Is Reliable and Probative

I have discussed this “right” above. Again, this is nothing to be overly proud of.

The United States Government must Provide Defense Counsel, Including Counsel
with the Necessary Clearances to Review Classified Information on the Accused’s Behalf

This has been discussed above under the “The Right to Counsel.” An attorney who is not allowed to review the evidence against his client is no attorney at all; without this provision, the right to counsel would be entirely meaningless.

In Capital Cases, the Military Commissions’ 12 Panelists must
Unanimously Agree on the Verdict, and the President Has a Final Review

A unanimous 12-person jury has been required in all capital cases since early common law.

Right to Appeal to a New Military Court, the Court of Military Commissions
Review, and the Court of Appeals for the District of Columbia

The Court of Military Commissions Review is modeled on the intermediate service Courts of Review under the Uniform Code of Military Justice. It is not an innovation. Review by the Court of Appeals for the District of Columbia replaces review by the Court of Appeals for the Armed Forces (under the UCMJ). While that inserts a civilian review court into the process, its scope of review is restricted under the MCA to considering whether the commission followed the rules and procedures of the MCA, and, "to the extent applicable," the Constitution and other laws of the United States. What this means in practice remains to be seen, but the clear intention of the MCA was to limit the Court of Appeals jurisdiction as much as possible.

The Right Against Double Jeopardy

This is incorrect; the Fifth Amendment right against double jeopardy is not included in the MCA. The MCA says only that an accused that has been tried once *by a military commission* may not again be tried by a military commission. It specifically does not say that a criminal defendant, tried and acquitted in federal court, may be tried again in a military commission. Since there is concurrent jurisdiction in federal courts over virtually all of the MCA-defined crimes, there is no guarantee that that will not occur.

MISTREATMENT OF DETAINEES AT GUANTANAMO BAY

Congressman Hunter also inquired about evidence of mistreatment of detainees at Guantanamo Bay. Again, I limit my testimony to detainees who are represented by the attorneys in my office. My comments are not intended in any way to underscore the magnificent work done by the men and woman who have and who are serving in a myriad of ways at GTMO. From the Guard Force to the Medical personnel, from the support personnel to all involved, the vast majority have performed professionally under very difficult circumstances. I, myself, have served as the acting SJA. As a Legal Support Organization Commander and before that, as a Training Officer, I have personally assigned attorneys to the SOUTHCOM SJA's office and to the JTF-GTMO SJA's office. I am honored to have served and honored to have provided dedicated personnel to serve the detention mission. Our dedication is not the issue. Our overwhelming professionalism is not the issue. The issue is the system we have created and its intended and unintended consequences.

The level and nature of abuse at Guantanamo is disputed. It is clear that any plan for going forward must address the issue of detainee abuse at Guantanamo, for which there has yet to be a true and full accounting. We know detainees at Guantanamo have been abused by US personnel, and continue to face the possibility of abuse, in ways that have changed over time. The bottom line: despite numerous investigations and inquiries, we still do not have the full picture necessary to move forward in a positive direction.

In May, the Inspector General completed an investigation into detainee abuse as experienced by FBI agents in Guantanamo, Afghanistan and Iraq. But this investigation does not fully describe the reasons for, nature of, and effect of abuse at Guantanamo, and the OIG did not evaluate the legal or policy implications of DOD operating procedures. As far back as summer of 2002, the FBI decided its agents would not participate in joint interrogations of detainees with other agencies in which harsh or extreme techniques not allowed by the FBI would be employed, and of course they can't report on what happened when they weren't there. Once it was clearly established within each military zone that military interrogators were permitted to use interrogation techniques that were not available to FBI agents, FBI on-scene commanders said they often did not elevate complaints about harsh interrogations to higher-ups. In 2003, the FBI on-scene commander at Guantanamo was told the FBI's mission did not include investigating detainee allegations of abuse, and agents tracking potential "war crimes" against detainees at Guantanamo were told to discontinue a separate file. The OIG worked off of agents' accounts, not detainees' accounts, and interviewed only six current or former Guantanamo detainees for this report. In general, the concern is that the FBI was focused mainly with its own people, not those in the military.

DOD conducted a number of investigations into detainee abuse throughout the military, but these don't answer our questions either. In 2006, the DOD Inspector General assessed 13 senior-level reports conducted by DOD from August 2003 through April 2005 throughout military detention at Guantanamo and in Afghanistan and Iraq. Among the investigations that touched upon detainee abuse at Guantanamo, the IG noted several features I think are relevant: the Schlesinger report stated that detainee abuse implicated both institutional and personal responsibility at higher levels, but did not specify where and to whom such culpability should be assigned for follow-up investigation; the Church report's lack of clear and explicit individual findings and specific recommendations highlighted the need for a separate assessment of possible detainee abuse involving Guantanamo; the Kiley report, which assessed detainee medical operations, did not adequately assess the adequacy of investigations into or the actual roles of medical personnel in detainee abuse.

The attorneys in my office discovered another shortcoming of these investigations: sometimes the investigators weren't told the truth. The Schmidt/Furlow report, which examined allegations of abuse at Guantanamo made by FBI agents, did not go beyond FBI allegations, and did not consider whether authorized techniques were, in fact, appropriate. Lt. Gen. Schmidt described the "frequent flyer program", in which detainees were moved every few hours from one cell to another to disrupt their sleep. Lt. Gen. Schmidt was told this program was for use on high-value detainees and was barred in March 2004 by the new commander. Yet, defense counsel for Mr. Jawad discovered that his client was moved 112 times in 14 days between cells – 14 days of sleep deprivation – *after* the program was supposedly barred, as reported to Lt. Gen. Schmidt. When made aware of this just recently, Lt. Gen. Schmidt told the press he thinks someone should be held accountable for not following established policy and command directives at the time.¹

¹ DELETE BEFORE FINAL: <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/07/AR2008060701904.html?hpid=topnews>

The IG observed generally that allegations of detainee abuse were not consistently reported, investigated, or managed in an effective, systematic, and timely manner, and concluded that despite the high number of senior-level reports, this issue needed further examination. These investigations did not fully incorporate a component that is absolutely essential for any investigation into detainee abuse: interviewing detainees. By this I do not mean accepting what every detainee says as the truth of the matter, but using a specific allegation of abuse from the person who was purportedly the subject of that abuse as a starting point to answer the question: did this happen or not?

This is what the attorneys in my office have to do in order to properly represent their clients in military commissions: take their stories of abuse, and look for indicia of credibility or facts that corroborate. Here are some examples of what we have found out. I must remind you that military commission defense counsel are limited in their ability to obtain information about how our clients have been treated at Guantanamo and elsewhere. Furthermore, we operate under restrictions that preclude public disclosure of most of the information we do have. For example, I am not including any information about current detention conditions of detainees transferred from CIA to military custody in September of 2006, as everything said by these detainees is presumptively classified. None of the information in these examples is classified, although some related reports and sources are classified.

Salim Hamdan: Mr. Hamdan was subjected to physical abuse before arriving at Guantanamo Bay and after his arrival at Guantanamo Bay. Several different agencies are responsible for the abuse. We can confirm that he was subjected to a program of sleep deprivation known as Operation Sandman during a fifty-day period between June and July 2003. This was not the only abuse that occurred at Guantanamo Bay. I can provide no further details on Mr. Hamdan's treatment in an unclassified setting. I can say, however, that Mr. Hamdan was interrogated by several different agencies, each of which seemed unaware of the activities of the others.

Mohammad Jawad: In June 2008, Mr. Jawad was beaten, kicked and pepper-sprayed by guards while face down on the concrete floor with both his hands and feet shackled. This incident was precipitated by the guards' insensitivity to Mr. Jawad's religious beliefs. An investigation was conducted and concluded that the guards used excessive force. The report itself is classified. Mr. Jawad was also subjected to the deliberate sleep deprivation program referred to as the frequent flyer program, two months after it was claimed by Maj Gen Jay Hood, former JTF-GTMO Commander that he had ordered the frequent flyer program discontinued. Mr. Jawad was also subjected to two 30 days periods of isolation while still a teenager.

Omar Khadr: Mr. Khadr was 15 when he was captured in Afghanistan in 2002. His military counsel recently requested an investigation by the Department of Defense's Inspector General into various abuses that he suffered in Bagram Prison and Guantanamo.

Mohammed al Qahtani: The known features of Special Interrogation Plan 1, approved by then-Secretary of Defense Donald Rumsfeld for use on Mr. al Qahtani at Guantanamo Bay are: (1) the prolonged use of sleep deprivation (20 hour interrogations every day for a 58 day period);

(2) the use of medical procedures as interrogation techniques (IV liquids combined with refusals to allow Al Qahtani to use restroom facilities forced him to both defecate and urinate on himself on multiple occasions); (3) physical and sexual humiliation through the use of nudity; (4) prolonged sensory over-stimulation (neither lights nor music were turned off during the 4 hour "sleep periods" during the 58 day sleep deprivation period); and (5) threats by military working dogs. The information on these techniques is publicly available.

I think there is a profound misunderstanding about what detention at places like Guantanamo is and does to human beings. My attorneys have seen first-hand the effects of prolonged arbitrary detention in prison-like conditions of people who have not been convicted of a crime, and many of whom have been subjected to extended periods of isolation. Human Rights Watch recently released a report that compared what is known publically about detention conditions at Guantanamo with standards for Supermax detention. They found that in some respects, parts of Guantanamo were more restrictive than many "supermax" prisons in the United States. And keep in mind – Supermax facilities are for the most violent of *convicted* criminals; the government has announced that it is not even going to *charge* the vast majority of detainees who remain incarcerated at Guantanamo, and the population includes people cleared for release.

Finally, we know that the Office of Legal Counsel for the Department of Justice generated a series of legal opinions allowing detainee treatment that many consider tantamount to torture under traditional interpretations of U.S. and international law. Not all these legal opinions have yet been released, or even acknowledged. In 2002 and again in 2003 then-Secretary of Defense Rumsfeld enacted policies based on these opinions that authorized specific interrogation techniques at Guantanamo. Furthermore, although the President ordered the military to treat detainees humanely, there was an exception for military necessity.

Regardless of Congress's view of the propriety of the legal analysis offered by the OLC, or the effect such opinions may have on the legal liability of military members who followed this guidance, we cannot determine whether the actions taken at Guantanamo even complied with this guidance if we don't know what it was. The legality of these controversial forms of treatment was apparently based on the controlled and highly-regulated manner in which they were used. Yet attorneys in my office struggle to get records and operating procedures to tell us how to evaluate how our clients were treated.

I am not suggesting that some of the detainees at GTMO are not very dangerous people. I am not suggesting that we treat them with "kid gloves". However, we are the United States of America. We are the vanguard of FREEDOM. The world looks to us for due process and fairness. As bad or evil as those in GTMO might be and are, we should be showing off our system of Justice and fairness and showcase to the world our Federal System or our Military Justice System to demonstrate that even the "worst of the worst" are treated fairly like any other person. This would not only maintain our legal integrity but enhance it and most likely inspire many say to say to themselves "The US practices what it preaches despite being attacked, despite being scared, despite being threatened."

MY RECOMMENDATIONS

Close Guantanamo; Or, at a Minimum, Recognize the Full Force of The The United States Constitution in Military Commission Trials

The military commission proceedings at Guantanamo should be abated and the MCA repealed. The Guantanamo trials continue to stain America's reputation around the world and at home – unnecessarily so, because all of the accused can be tried in federal courts, where both their rights and the government's security concerns will be respected. Federal courts already have jurisdiction over all of the crimes created by the MCA for the commissions, and have proved fully capable of handling these trials. Indeed, one detainee has been charged in the same Embassy Bombing conspiracy that was tried successfully in the Southern District of New York several years ago.

Short of closing Guantanamo, measures need to be enacted to ensure that the commission system meets the same standards of American justice as federal courts and courts-martial. That means, above all, ensuring that the full panoply of constitutional rights recognized in every other American court is honored in the commissions as well. That is the thrust of the *Boumediene* decision, and Congress as well as the federal courts should act on its clear message.

Fully Investigate Detainees' Allegations of Abuse, Address Those Past and Current, and Institute Policies that Will Preclude Their Repetition

The detainees at Guantanamo have been the subject of affirmative policies which, either by deliberate action or by mistake, have led to abusive conditions and actions, past and ongoing. Until we understand what has happened at Guantanamo and why, and what is happening still, Guantanamo will remain a stain on our national honor for this reason as well, haunted by a specter of impunity and ineptitude. Many of these abuses are a direct result of interrogation programs and detainee management "techniques" that overstep the Constitution in a manner that is entirely unprecedented in American history. Others are the product of a profound misunderstanding of prolonged arbitrary and incommunicado detention. The first steps in ending abuses at Guantanamo were taken when the judicial and legislative branches insisted Common Article 3 and prohibitions on cruel, inhuman and degrading treatment applied there. The next steps must be functions of factual accounting of what has gone before, a clear-eyed assessment of how these standards are not yet fully given force, and real-world policy changes that move us forward.

This will require more than the Detainee Treatment Act; it requires a full accounting of the abuses that have actually taken place and an analysis of their causes in the programs that led to them. It appears that the United States military is going to be in the detention business for quite some time, if not at Guantanamo then elsewhere. At a practical level, we cannot adequately prepare our troops to safely and humanely carry out detention functions unless we know which actions on the part of their leaders resulted in which problems. Congress should authorize a full

and complete investigation into the conditions at Guantanamo, one that includes interviews with the detainees. Where detainees are represented by counsel, that may require going through the attorney, of course (especially where the detainee has been charged). Nevertheless, however the interviews are conducted, until such an impartial and balanced investigation is completed, we will not be able to benefit from the mistakes we have made there.

My supplemental recommendations are as follows:

1. Remove and Reassign the Legal Advisor.
The credibility and integrity of the Commissions is at more risk due to these ongoing issues that have become a sideshow. Morale is low and something must be done. A Command Climate Survey of OMC would be disastrous.
2. Create a small, independent Legal Advisor Office with the Senior Officer being a 0-6 so as to be equal in rank to the Chief Prosecutor and the Chief Defense Counsel. Locate the Legal Advisor's office away from the OMC operations.
3. Take the Legal Advisor out of the chain of command of the Chief Prosecutor
4. Create the position of Liaison to the Chief Prosecutor, the Chief Defense Counsel and the Judges and make it a 0-6 position.
5. Establish an independent agency to investigate all reports of detainee abuse or maltreatment so as to remove that burden/concern from existing organizations and let them concentrate on doing their particular mission.
6. The Chief Defense Counsel, the Chief Prosecutor and the Liaison Officer should meet monthly on logistics issues and related matters.
7. The Chief Defense Counsel should be afforded the opportunity to participate in many of the discussions that occur at present to which the Chief Defense Counsel is not currently invited to and where decisions are being made that adversely affect the ability to properly represent the accused consistent with the mandate and obligations of the MCA and the regulations.

Thank you for the opportunity to supplement my earlier testimony. I want to conclude by stating that I proudly and reverently display the "Flag of Honor" in my office when I am on the bench in Indiana as a Circuit Court Judge. It lists the names of the 9-11 victims. I do not think serving as Chief Defense Counsel is inconsistent with displaying that flag. As a Trial Court Judge in my civilian life I am sworn to uphold and defend the Constitution, just as I am as an attorney and a Military Officer. We are the greatest nation on Earth. Many things make us great – our diversity; our humble beginnings; our spirit; our values; and certainly our commitment to the RULE OF LAW. In these trying times, these times of fear and uncertainty, I believe we must defend the Rule of Law and I believe we must try the "worst of the worst" in a fair and respected system affording them all the rights that we hold so precious, as difficult as that might be.

As Abraham Lincoln said ... "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violations by others. As the patriots of the seventy-six did to the support of the Declaration of Independence, so to the support of the

Constitution and Laws, let every American pledge his life, his property, and his sacred honor; -- let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries.....in short let it become the political religion of the nation...”

The Office of the Chief Defense Counsel is not the enemy in this process. Our mission is to defend the Rule of Law and represent our clients zealously. We are as an important to the preservation of our great nation as the Prosecution or any other entity affiliated with the Military Commissions Process.

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 31, 2008

QUESTIONS SUBMITTED BY MR. SKELTON

The CHAIRMAN. There is a law on the books called the Classified Information Procedures Act. The attorney general mentioned in his speech before the American Enterprise Institute that there should be legislation in relation to *habeas corpus* proceedings that are related to the status of detainees, that the Classified Information Procedures Act is inadequate. Upon what basis does the attorney general make that assertion?

Mr. KATSAS. When classified materials may be relevant to *criminal* proceedings, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. III §§ 1-16, Pub. L. 96-456, provides procedures designed to protect the rights of the criminal defendant while minimizing the associated harm to national security. The habeas litigation currently ongoing in the wake of *Boumediene*, like all habeas litigation, is civil in nature, and therefore CIPA has no application to it. CIPA reflects a fundamental policy choice that individuals subject to criminal prosecution should be entitled, in some circumstances, to access classified information for their defense. That conclusion is inapplicable to aliens captured and held outside the United States as wartime enemy combatants.

Wartime status determinations, whether performed by the military or by habeas courts, are fundamentally different from criminal prosecutions. The purpose of detaining enemy combatants for the duration of hostilities is not to punish, but to prevent those combatants from returning to the battle to fight against American soldiers and interests. In that context, the Government should not be put to the Hobson's choice of either releasing Taliban or *al Qaeda* combatants during the ongoing conflict, on the one hand, or sharing with those combatants classified national security information about our intelligence sources, methods, or operations, on the other.

Finally, to the extent that the question relates to military commission prosecutions of enemy combatants, those prosecutions are being undertaken by the Office of Military Commissions in the Department of Defense. Although the Department of Defense is best able to respond to questions regarding the military commission process, generally, I would like to note an important point. As iterated earlier, the Attorney General's comments that are the subject of the question above related not to criminal trials, but to civil habeas corpus proceedings—proceedings in which CIPA does not apply. Similarly, CIPA does not apply in military commission prosecutions either; however, the Military Commissions Act of 2006 provides similar—but more extensive—protections for classified information in the commission process.

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